TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 226

OLD DEARBORN DISTRIBUTING COMPANY,
APPELLANT,

vs.

SEAGRAM-DISTILLERS CORPORATION

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

FILED JULY 24, 1936.

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IN CIRCUIT COURT OF COOK COUNTY

IN CHANCERY

No. 35C16726

SEAGRAM-DISTILLERS CORPORATION, a Corporation, Plaintiff,

vs.

OLD DEARBORN DISTRIBUTING Co., a Corporation, Defendant

COMPLAINT

Seagram-Distillers Corporation, a corporation, plaintiff, by Mayer, Meyer, Austrian & Platt, its attorneys, complains against Old Dearborn Distributing Co., a corporation, and says:

1. Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and is, and during all of the times hereinafter mentioned has been licensed to do business in the State of Illinois, and engaged in the business of dealing in and selling alcoholic beverages of standard quality, under the trade-marks, brands and names of the producers thereof.

2. Defendant is a corporation organized and existing under and by virtue of the laws of the State of Illinois and is, and during all of the times hereinafter mentioned, has been engaged in the business of selling alcoholic beverages at retail to the general public at stores operated by it at 208 West Madison Street, 209 South Wabash Avenue and 3202 Lincoln Avenue, all in the City of Chicago, in said State, under the trade names, styles and descriptions of "Old Dearborn Liquor Stores, Inc.," "Old Dearborn Liquor Stores", "Old Dearborn Liquor Store" and under its said corporate name, "Old Dearborn Distributing Co."

3. Plaintiff is and at all times hereinafter mentioned has been engaged throughout the United States and in the State of Illinois in the business of dealing in, selling and distributing, at wholesale, alcoholic beverages of standard quality produced by Joseph E. Seagram & Sons, Ltd., a corporation, Joseph E. Seagram & Sons, Inc., a corpora-

tion, and corporations affiliated with said corporations, under the trade-marks, brands and names of said corporations. Said beverages included and include "Seagram's Ancient Bottle Rye, Seagram's Pedigree de Luxe Rye, Seagram's Bourbon, Seagram's Pedigree de Luxe Bourbon, Seagram's "83", Seagram's "V. O.", Seagram's Five [fol. 3] Crown Blended Whiskey, Seagram's Seven Crown Blended Whiskey, Seagram's King Arthur Distilled Gin, Seagram's Superior Distilled Gin, Kessler's Private Blended Whiskey, and Kessler's Preferred Blended Whiskey. The foregoing brands are sold in various sized bottles, including the following sizes: 4/5 quart, quart, pint and half-pint. Said beverages, which are hereinafter referred to as "Seagram's Whiskies and Gins" and "Kessler's Blended Whiskies", bear trade-marks, brands and names of Joseph E. Seagram & Sons, Ltd., or Joseph E. Seagram & Sons, Inc., or of corporations affiliated with said corporations, which are the respective producers thereof, and each of said beverages is, and during all of the times hereinafter mentioned was, in fair and open competition with commodities of the same general class produced by others and sold and distributed throughout the State of Illinois. Plaintiff has continuously since long prior to the times hereinafter mentioned, sold said "Seagram's Whiskies and Gins" and "Kessler's Blended Whiskies" in the State of Illinois and elsewhere under said trade-marks, brands and names, and for a long time prior to the time of defendant's acts herein complained of and continuously thereafter, plaintiff and the aforesaid corporations producing said beverages have expended large sums of money in advertising the high and standard quality of said beverages and the trade-marks, brands and names under which they are sold as aforesaid in the State of Illinois. Said beverages and each of them, and the trade-marks, brands and names under which they are sold, have become widely and favorably known to the trade and the public generally in the State of Illinois, and the plaintiff has sold large quantities of each of said beverages in the City of Chicago.

4. Plaintiff is, and continuously since long prior to the times hereinafter mentioned, has been the sole person firm or corporation authorized by the producers of said "Seagram's Whiskies and Gins" and "Kessler's Blended Whis-

kies" to regulate and control the sale and distribution of said beverages in the State of Illinois. Plaintiff has not sold and does not sell any of said beverages at retail or at wholesale directly to any retailers in said state, but has confined and continues to confine its sale and distribution of the same to a limited number of wholesale distributors, who in turn have resold and do resell the same at wholesale to retailers. Prior to the time of the first of the defendant's acts complained of hereunder, in order to protect dealers in said beverages and the public within said State of Illinois and the producers of said "Seagram's Whiskies and Gins" and "Kessler's Blended Whiskies" and itself against the injurious and uneconomic practices of price cutting in the distribution of said beverages in said state under said trade-marks, brands and names, plaintiff executed Fair Trade Contracts in accordance with the provisions of the Fair Trade Act of the State of Illinois, with all of its distributors in said state and with large numbers of retailers therein. Defendant under the trade name and style of "Old Dearborn Liquor Stores, Inc." executed in the City of Chicago in said State, one of said Retailer's Fair Trade Contracts with plaintiff on or before October 11, 1935. Said Contract is still in full force and effect, and a copy thereof is attached hereto as Exhibit 1 and made a part hereof. Prior to the time of the defendant's conduct complained of herein, and continuously ever since, the plaintiff has sold all of said beverages distributed by it in the State of Illinois subject to the terms and provisions of said Fair Trade Contracts.

[fol. 4] 5. Under the terms and provisions of said Fair Trade Contracts with said distributors and retailers, including that with the defendant, it is provided that said beverages shall not be sold, advertised or offered for sale within the State of Illinois below the minimum prices stipulated from time to time by plaintiff in written schedules thereof furnished to said distributors and retailers. A form of said contract made with distributors is attached hereto as Exhibit 2 and is made a part hereof.

6. Pursuant to and in accordance with said Fair Trade Contracts and prior to the acts of the defendant complained of herein, plaintiff announced and made known generally to the trade throughout the State of Illinois by the wide-

spread mailing of written schedules and otherwise, the minimum prices at which said beverages were and are to be sold at wholesale to retailers and at retail to consumers in said state. Prior to the time of the first act of the defendant complained of hereunder, defendant received a schedule of such minimum prices, which prices are the same as those continuously in effect since August 26, 1935, and up to and at the present time. A copy of said schedule and a copy of a written communication accompanying the same, received by defendant, are hereto attached and made a part hereof as Exhibits 3 and 4.

7. Defendant, notwithstanding its promises in said Fair Trade Contract entered into with plaintiff, and notwithstanding plaintiff's insistence that defendant comply therewith, did at the places and times hereinafter mentioned, wilfully and knowingly advertise, offer for sale and sell at retail in the State of Illinois certain of said "Seagram's Whiskies and Gins" in bottles or containers bearing the trade-mark, brand or name of the producers thereof at less than the prices stipulated by plaintiff for their resale at retail;

(a) On November 13, 1935, in the store operated by defendant at 3202 Lincoln Avenue, Chicago, Illinois, defendant advertised and offered for sale to the public by affixing price tickets displaying prices less than said minimum prices stipulated by the plaintiff, as hereinafter indicated, upon the following of said brands:

Brand	Sizes	Plaintiff's Stipulated Resale Prices	Defendant's Cut Prices
Seagram's Five Crown Blended Whiskey	Pints	$1.35	$0.99
Seagram's Seven Crown Blended Whiskey	Pints	1.59	1.29
Seagram's Seven Crown Blended Whiskey	Quarts	3.10	2.58
Seagram's Five Crown Blended Whiskey	Quarts	2.59	1.98
Seagram's Seven Crown Blended Whiskey	Half Pints	.85	.75
Seagram's Five Crown Blended Whiskey	Half Pints	.69	.59
Seagram's V. O.	Pints	2.47	2.39
Seagram's V. O.	Quarts	4.79	3.69

(b) On November 15th and 16th, 1935, defendant wilfully and knowingly further violated its said Fair Trade [fol. 5] Contract with plaintiff at the store operated by

defendant at 208 West Madison Street, in said City of Chicago, by advertising, offering for sale and selling the following of said beverages at prices below said minimum resale prices stipulated by plaintiff as hereinafter indicated:

Brand	Sizes	Plaintiff's Stipulated Resale Prices	Defendant's Cut Prices
Seagram's V. O.	Pints	$2.47	$2.09
Seagram's Ancient Bottle Rye	Pints	2.49	2.29

As one of the means, among others, adopted by the defendant to further its sale of said brands at said cut prices, and to induce the public to purchase the same, the defendant affixed to its window at its said store a poster conspicuously displaying such cut prices, a photograph of which poster as so displayed is attached hereto as Exhibit 5 and made a part hereof.

(c) On November 15th and 16th, 1935, defendant further wilfully and knowingly violated its said Fair Trade Contract with plaintiff at the store operated by defendant at 209 South Wabash Avenue in said City of Chicago, by advertising and offering for sale said Seagram's V. O. in pints at the cut price of $2.09 each and said Seagram's Ancient Bottle Rye pints at the cut price of $2.29 each, and, as one of the means, among others, adopted by the defendant to further its sale of said two brands at said cut prices and to induce the public to purchase the same, the defendant affixed to its window at its said store a poster conspicuously displaying such cut prices, a photograph of which poster as so displayed is attached hereto as Exhibit 6 and made a part hereof.

(8) Following the aforesaid wilful violations by defendant of said Fair Trade Contract and on November 16, 1935, plaintiff demanded of the defendant that it discontinue advertising, offering for sale or selling any of said "Seagram's Whiskies and Gins" and "Kessler's Blended Whiskies" below the minimum price stipulated by the plaintiff from time to time in accordance with said Fair Trade Contract; that defendant, notwithstanding plaintiff's demand and insistence that defendant comply with its promises contained in said Fair Trade Contract, refused to discontinue advertising, offering for sale and selling said bever-

ages at less than the prices stipulated by plaintiff, and advised plaintiff that the defendant would not comply with its promises contained in said Fair Trade Contract and that defendant proposed to continue to violate the same and to sell said beverages at prices below the minimum prices stipulated by the plaintiff from time to time and at such resale prices as defendant desired to fix from time to time for the resale of the same; that defendant has, in accordance with its threats so to do, continued to violate said Fair Trade Contract, by advertising, offering for sale and selling certain of said beverages at prices below the said minimum prices stipulated by the plaintiff and continues so to do to the irreparable injury and damage to plaintiff's good will and business, to said "Seagram's Whiskies and Gins" and to the good will and business of the producers thereof, and the trade-marks, brands, and names under which said beverages are sold.

(9) Defendant's conduct has caused and is continuing to cause plaintiff irreparable damage and unless defendant is immediately enjoined and restrained from continuing [fol. 6] such conduct the plaintiff will suffer further irreparable damage in that such wrongful conduct of the defendant will result in a decreased demand for such beverages and in a decrease in plaintiff's sales, and will cause others dealing in beverages bearing the same trade-marks, brands or names to breach plaintiff's Fair Trade Contracts thereby disorganizing the distribution of said beverages by plaintiff, and will continue to irreparably damage and injure the good will of the plaintiff and the good will and trade-marks, brands and names of the producers of said beverages, all to the great damage and financial loss of the plaintiff and to its irreparable injury.

Inasmuch as plaintiff is without an adequate remedy at law and because of the statute in such case made and provided plaintiff Prays that the said defendant and its officers, agents, servants, employees and each and every of them may be, during the pendency of this suit, temporarily enjoined and restrained by this Honorable Court and in the final decree entered herein forever enjoined and restrained by the court from advertising, offering for sale or selling said Seagram's Ancient Bottle Rye, Seagram's Pedigree De Luxe Rye, Seagram's Bourbon, Seagram's Pedigree

De Luxe Bourbon, Seagram's "83", Seagram's "V. O.", Seagram's Five Crown Blended Whiskey, Seagram's Seven Crown Blended Whiskey, Seagram's King Arthur Distilled Gin, Seagram's Superior Distilled Gin, Kessler's Private Blended Whiskey, and Kessler's Preferred Blended Whiskey, or any of them at less than the prices stipulated by plaintiff from time to time in accordance with the terms and provisions of plaintiff's Fair Trade Contracts with Distributors and Retailers in the State of Illinois, and that plaintiff may have such other and further relief as to the court shall seem just.

Seagram-Distillers Corporation, by Mayer, Meyer, Austrian & Platt, Its Attorneys. Mayer, Meyer, Austrian & Platt and Otto Kerner, Jr., Attorneys for Plaintiff.

Duly sworn to by Clarence G. McQuaide. Jurat omitted in printing.

[fol. 7] IN CIRCUIT COURT OF COOK COUNTY

[Title omitted]

ANSWER

The defendant for answer to the complaint of the plaintiff herein by Attorneys Irving Breakstone and Irving Greenspahn, says:

1. That it has not sufficient information to form a belief as to the truth of the allegations contained in paragraph numbered one of the complaint herein, and therefore denies the same and demands strict proof thereof.

2. Defendant admits the allegations of paragraph two of the said complaint save and except that it denies that it, the said defendant, did business under any trade name, styles and descriptions such as set forth in said paragraph numbered two of the complaint herein or any other trade names, styles and descriptions other than its proper corporate business name as contained in its charter.

3. Further answering the said complaint defendant states that it has not sufficient information upon which to form a belief as to the allegations contained in paragraph

three of the complaint herein and therefore denies the same.

[fol. 8] 4. Defendant denies the execution of the alleged contract set forth in paragraph numbered four of the complaint and states that the said contract is not the contract of the defendant but is as it purports to be, the contract of a corporation or party or person other than the defendant herein. Further answering said paragraph numbered four of the complaint herein, defendant says that it has not sufficient information upon which to form a belief as to the truth of the remaining allegations thereof and therefore denies the same.

5. Further answering said complaint defendant says it has not sufficient information to form a belief as to the truth of the allegations contained in paragraph numbered five of the said complaint and therefore denies the same.

6. Defendant denies the allegations of paragraph numbered six of the said complaint to the effect that it received a schedule of certain alleged minimum prices of the plaintiff continuously in effect since August 26, 1935, and up to and at the present time. Defendant denies that it received a copy of the said schedule and a copy of a written communication accompanying the same mentioned in paragraph numbered six of the said complaint and therein referred to as plaintiff's Exhibits Three and Four, by mail or otherwise and says that the first copies thereof it had ever received were those attached to and made a part of the copy of the complaint in this cause when the same was served upon the defendant herein. Further answering the said paragraph numbered six of the complaint herein defendant says it has not sufficient information to form a belief as to the truth of the remaining allegations contained in said paragraph numbrered six and therefore denies the same.

7. Defendant states that it did on the dates mentioned in paragraph numbered seven, sell the merchandise of the description set forth therein at the schedule of prices as [fol. 9] stated in paragraph seven of the complaint, at the stores located as described therein. Defendant states that it had no knowledge of any stipulated resale prices of the plaintiff as set forth therein. Defendant states that all merchandise sold by it as set forth in said paragraph num-

bered seven of the said complaint were sold at a profit to the defendant herein. Defendant admits the advertisements and posters set forth in this paragraph of the complaint and incorporated therein as Exhibits Five and Six. Further answering this paragraph of the complaint defendant states that at no time did it authorize any officers, agents, servants or employees to enter into any contracts of whatsoever name, nature or description as those set forth in the complaint herein and as described in paragraph numbered four and incorporated therein as Exhibit One and in the alternative in the event the said contract should be by the Court held to be the bona fide contract of the defendant and that the signature thereto is binding upon the defendant and its signature, that then the said contract in addition to being unauthorized and executed without authority is ultra vires and without the powers of the defendant corporation by its charter and the laws of the State of Illinois to enter into and perform.

8. Defendant in answer to the allegations contained in paragraph numbered eight of the complaint states that it acquired the merchandise in question by purchase from other firms and corporations than the plaintiff and that it had no contractual relations of whatsoever name, nature or description with the plaintiff in reference to the merchandise sold at the times and places in question as set forth in the complaint herein and that the said merchandise was purchased by the defendant at prices below the minimum schedule of prices for the sale of plaintiff's products by its distributors and retailers as set forth in the complaint herein.

9. Defendant denies the allegations contained in paragraph numbered nine of the said complaint and further [fol. 10] alleges in the alternative as to the allegations thereof Damnum Absque Injuria.

10. Defendant says that it owes no duty unto the plaintiff upon which to premise any order compelling defendant to charge prices for its merchandise by it owned and as described in the complaint herein arbitrarily imposed upon the said defendant by the plaintiff through the alleged contract as set forth in the complaint herein.

11. Defendant states that Sections VIII to XI inclusive of Chapter 140, Illinois Revised Statutes, 1935, upon which

plaintiff's purported cause of action is based, and upon which the validity of its purported contract is premised, is unconstitutional and void because:

(a) They violate the provisions of Section 2 of Article II of the Constitution of Illinois.

(b) They violate the provisions of the Fifth Amendment and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

and that the alleged contract referred to in the complaint as Exhibit One is invalid and unenforceable because:

(a) The said contracts violate the criminal law of Illinois in regard to pools, trusts and combinations.

(b) They violate the public policy of Illinois.

(c) They violate the common law of Illinois.

(d) They violate the provisions of Section 2 of Article II of the Constitution of Illinois.

(e) They violate the provisions of the Fifth Amendment and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

(f) That in the alternative if the said contract set forth in the complaint as Exhibit One is the contract of the defendant the same is void because it is executed without consideration, because it is unilateral and lacks mutuality and therefore void.

12. Defendant states that the Court does not have the power or jurisdiction to fix minimum prices for the defendant's merchandise and that stifles and prevents com- [fol. ..] petition, and that the purported contracts employed by the plaintiff and as described in the complaint herein or any order or decree that fixes prices and stifles competition, is without authority and contrary to the laws of the State of Illinois.

13. Defendant states that the complaint does not state a cause of action sufficient to justify the entry of an injunctional order and the other relief prayed for in said complaint.

14. Defendant states that the acts and doings of the plaintiff as disclosed by the complaint, show that in relation to

the subject matter of the litigation, the plaintiff is guilty of unconscionable and illegal conduct and do- not come into a Court of equity with clean hands and therefore should be denied relief of any kind.

15. Defendant states that the attempt of the plaintiff to fix prices for its merchandise and to stifle and prevent competition in the sale thereof by the contracts and devices set forth in the complaint herein is a fraud upon the public in that the aforementioned acts of the plaintiff prevents competition, restricts freedom of action in trade or commerce and are hostile to the public welfare and are not consonant with the spirit of our established institutions and are in violation of law.

16. Defendant states that it has conducted its stores for several years; that it sells its merchandise for cash only and enjoys a good will and a sales volume of many thousands of dollars per annum. That Sections VIII to XI inclusive of Chapter 140 of Illinois Revised Statutes, 1935, is an unconstitutional delegation of legislative power to private persons and in violation of Article III of the Constitution of the State of Illinois.

17. Further answering said complaint defendant states that it is informed and believes that many retailers of merchandise of the description contained in the complaint, and [fol. 12] competitors of the defendant have not entered into contracts with the plaintiff of the nature of those set forth in the complaint and that they sell the said merchandise below the minimum prices proclaimed by the plaintiff as described in its complaint; that certain of said retailers and competitors are favored over another and that defendant, in the regular course of its business, sells its merchandise at such prices as to attract customers and that its use of the merchandise in question is not destructive of competitors any more than are other forms of advertising that attract public attention.

18. Defendant states that it is informed and believes and therefore states the fact to be that the plaintiff in combination and concert with a number of other corporations, firms and individuals not seeking a fair and reasonable price for the sale of merchandise are aiming to eliminate fair competition so that the plaintiff and its aids and co-conspira-

tors can gouge the public by high prices and obtain tremendous profits; that upon information and belief much of the merchandise, the resale prices of which are sought to be controlled by the devices and in the manner as set forth in the complaint herein, are articles in interstate commerce and said contracts are in violation of the Anti-Trust laws of the United States and are a burden upon interstate commerce.

Wherefore defendant demands judgment dismissing the complaint, herein, and for its costs and disbursements and that the relief prayed for by the plaintiff herein be denied.

Old Dearborn Distributing Company, a Corporation, by Irving Breakstone and Irving Greenspahn, Its Attorneys.

Irving Breakstone, 140 N. Dearborn St., State 2922, and Irving Greenspahn, 139 North Clark St., Randolph 3560, Attorneys for Defendant.

[fol. 13] *Duly sworn to by Howard Blum. Jurat omitted in printing.*

[fol. 14] IN CIRCUIT COURT OF COOK COUNTY

[Title omitted]

REPLY

Plaintiff, by Mayer Meyer Austrian & Platt, its attorneys, for its reply to the answer of the defendant herein, says:

(1) That it is without knowledge of the allegations contained in paragraph (7) of said answer wherein it is alleged that "Defendant states that all merchandise sold by it set forth in said paragraph numbered (7) of said complaint, were sold at a profit to defendant herein", and Plaintiff denies that said contract was unauthorized, executed without authority or ultra vires and without the powers of the defendant corporation.

(2) It denies the allegations contained in paragraphs (10) to (15) inclusive, of said answer.

(3) It is without knowledge of the allegations contained in the first sentence of paragraph (16) of said answer and denies the allegations contained in the second sentence of said paragraph.

[fol. 15] (4) Without admitting the allegations contained in paragraph (17) of said answer it states that they are wholly irrelevant and immaterial to any issue in the case.

(5) It denies the allegations contained in paragraph (18) of said answer.

Seagram-Distillers Corporation, By Mayer Meyer Austrian & Platt, Otto Kerner, Jr., Its Attorneys.

Mayer, Meyer, Austrian & Platt, Otto Kerner, Jr., Attorneys for said Plaintiff.

Duly sworn to by Clarence G. McQuaide. Jurat omitted in printing.

[fol. 16] In Circuit Court of Cook County

In Chancery

No. 35C-16726

Seagram-Distillers Corporation, a Corporation, Plaintiff,

vs.

Old Dearborn Distributing Co., a Corporation, Defendant

Decree—November 30, 1935

This cause coming on to be heard for final hearing upon the verified complaint of plaintiff Seagram-Distillers Corporation, a corporation, filed herein November 19, 1935, the verified answer of Old Dearborn Distributing Co., a corporation, the defendant herein, filed herein November 21, 1935, and upon the verified reply of said Seagram-Distillers Corporation filed herein November 22, 1935 and said plaintiff, being now here represented in open court by Mayer, Meyer, Austrian & Platt and Otto Kerner, Jr., its attorneys, and said defendant being now here represented in open court by Irving Breakstone, and Irving Greenspahn, its attorneys, and the court having heard in open court the

evidence, both oral and documentary, offered and introduced on said hearing by both parties hereto, and also the arguments of counsel of both said parties and having now fully considered the same, and being now full- advised in the premises, Doth Find:

[fol. 17] 1. That the court has jurisdiction of all the parties hereto, and of the subject matter of this suit;

2. That the plaintiff has in all matters and things proceeded in this cause in accordance with law, and that all the material allegations of its complaint have been fully proven to be true, and that none of the alleged defenses set forth in said answer has been proven;

3. That the equities of this cause are with the plaintiff, and that the plaintiff is entitled to the relief prayed for in its complaint.

Now, Therefore, it is hereby Ordered, Adjudged and Decreed that Old Dearborn Distributing Co., the defendant, and its officers, agents, servants, employees, successors and assigns, and each and every of them, be and they and each of them hereby are forever enjoined and restrained by the court from wilfully and knowingly advertising, offering for sale or selling Seagram's Ancient Bottle Rye, Seagram's Pedigree De Luxe Rye, Seagram's Bourbon, Seagram's Pedigree De Luxe Bourbon, Seagram's "83", Seagram's "V.O.", Seagram's Five Crown Blended Whiskey, Seagram's Seven Crown Blended Whiskey, Seagram's King Arthur Distilled Gin, Seagram's Superior Distilled Gin, Kessler's Private Blended Whiskey, and Kessler's Preferred Blended Whiskey, or any of them, in the City of Chicago or elsewhere in the State of Illinois, at less than the prices stipulated by Seagram-Distillers Corporation, a corporation, plaintiff herein, from time to time under the "Fair Trade Act" of the State of Illinois, in accordance [fols. 18 & 19] with the terms and provisions of contracts made pursuant to said "Fair Trade Act" between plaintiff and its Distributors or between plaintiff and Retailers, which contracts, at the time of the filing of the complaint herein were, or now are or may hereafter be in force in Illinois relating to the sale or resale of any of said beverages in the State of Illinois.

Enter:

George Fred Rush, Judge.

[fol. 20] [File endorsement omitted]

[fols. 20-1–20-5] In Supreme Court of Illinois, April Term, A. D. 1936

Seagram-Distillers Corporation, a Corporation, Plaintiff (Appellee),

vs.

Old Dearborn Distributing Co., a Corporation, Defendant (Appellant)

Appeal from Circuit Court, Cook County

Honorable George Fred Rush, Judge Presiding

Abstract of Record—Filed January 30, 1936

Placita.
Verified complaint filed November 19, 1935.

[fol. 20-6] Exhibit 1 to Complaint

Fair Trade Contract

Seagram-Distillers Corporation

Th-s Agreement, made this 14th day of August, 1935, between Seagram-Distillers Corporation, a corporation with an office and place of business at 20 North Wacker Drive, Chicago, Ill. (hereinafter called "Owner"), and Old Dearborn Liquor Stores, Inc. of Chicago (hereinafter called "Retailer"),

Witnesseth:

Whereas, the Owner is engaged in the business of distributing alcoholic beverages in the State of Illinois produced by Joseph E. Seagram & Sons., Ltd., Joseph E. Seagram & Sons, Inc., and affiliated corporations, which bever-[fol. 20-7] age bears trademarks, brands and names of said corporations, and affiliated corporations, and

Whereas, said beverages are in fair and open competition with commodities of the same general class produced by others, and

Whereas, Owner has entered into contracts with Distributors, whereby said Distributors have agreed not to sell

within the State of Illinois any of said beverages to any Retailer in Illinois, unless and until said Retailer shall have executed a contract similar to this contract, and.

Whereas, it is the desire of the parties hereto to fix the resale prices of said beverages, both at wholesale and at retail, within the limits of the Fair Trade Act of Illinois for the purpose of insuring a fair return to those engaged in the sale thereof,

Now, therefore, the parties hereto agree as follows:

First. Retailer will not sell, advertise, or offer for sale within the State of Illinois any beverages for which the Owner is distributor and which bear trademarks, brands and names of Joseph E. Seagram & Sons, Ltd., Joseph E. Seagram & Sons, Inc., or affiliated corporations, which the Retailer has purchased, or now has on hand, or which Retailer may hereafter purchase, below the minimum prices stipulated from time to time by Owner for sale to Consumers, nor will he make any refunds, discounts, or concessions of any kind or character for the purpose of, or which will result in decreasing the said stipulated minimum prices, nor sell or offer to sell any of such beverages in combination with any other beverages at a single or joint price.

Second. In the event (a) of closing out the Retailer's stock for the purpose of discontinuing delivering any such beverages or, (b) that any of said beverages in Retailer's hands are damaged or deteriorated in quality, or (c) that Retailer has on hand any of said beverages after this agreement has been terminated, for any reason, Retailer shall, before offering any of said beverages for sale at prices less than the minimum resale prices fixed therefor, first offer to return such beverages to the Owner against payment therefor of an amount equal to the cost price thereof to Retailer.

[fol. 20-8] Third. The minimum sales prices of such beverages by Retailer to Consumers will be in accordance with written schedules thereof, furnished from time to time to Retailer by Owner, or distributor of Owner, which schedules are to be considered a part of this contract. The schedule last delivered to Retailer shall govern the resale price to consumer. Owner reserves the right to change the schedule of prices from time to time upon ten (10) days' written notice to Retailer.

Fourth. Inasmuch as it would be impracticable or extremely difficult to fix the damage which may be sustained by Owner by reason of a breach of this contract by Retailer, it is agreed that the Retailer shall pay to the Owner, as liquidated damages, the sum of Fifty ($50.00) Dollars for each breach of this contract, plus the amount by which the stipulated minimum resale price exceeds the price at which any of said beverages are sold. It is further agreed that the Owner, in addition to all other legal rights and remedies, shall be entitled to injunctive relief against any and all breaches of this agreement by the Retailer.

Fifth. This contract is made in pursuance of and by authority of the Fair Trade Act of the State of Illinois and known as Senate Bill 598 enacted at 59th General Assembly, must be executed in the State of Illinois by both parties hereto, and shall apply only to the sales made within the State of Illinois of beverages located therein.

In witness whereof, the parties hereto have caused this contract to be executed the day and year first above mentioned. This agreement subject to cancellation upon (30) Thirty Days notice in writing by either party.

Seagram-Distillers Corporation, by C. C. McQuaide.
Old Dearborn Liquor Stores, Inc., by Sa[illegible] I. Greenspahn, Secy. & Treas.

[fol. 20-9] EXHIBIT 2 TO COMPLAINT

Fair Trade Contract

Seagram-Distillers Corporation

This Agreement, made this — day of ——, 193-, between Seagram-Distillers Corporation, a corporation with an office and place of business at 20 North Wacker Drive, Chicago, Ill. (hereinafter called "Owner"), and —— —— of —— Chicago (hereinafter called "Distributor"),

Witnesseth:

Whereas, the Owner is engaged in the business of dealing in alcoholic beverages in the State of Illinois produced

by Joseph E. Seagram & Sons, Ltd., Joseph E. Seagram & Sons, Inc., and affiliated corporations, which beverages bear trade-marks, brands and names of said corporations and affiliated corporations, and

Whereas, said beverages are in fair and open competition with commodities of the same general class produced by others, and

Whereas, it is the desire of the parties hereto to fix the resale prices of said beverages, both at wholesale and at retail, within the limits of the Fair Trade Act of Illinois, for the purpose of insuring a fair return to those engaged in the sale thereof,

Now, therefore, the parties hereto agree as follows:

First. Distributor will not sell, advertise, or offer for sale within the State of Illinois any beverages which the Owner is handling and which bear trade-marks, brands and names of Joseph E. Seagram & Sons, Ltd., Joseph E. Seagram & Sons, Inc., or affiliated corporations, which the Distributor has purchased, or now has on hand, or which Distributor may hereafter purchase, below the minimum prices stipulated from time to time by Owner for sales to Retailers, nor will he make any refunds, discounts, or concessions of any kind or character for the purpose of, or which will result in decreasing the said stipulated minimum prices, nor sell or offer to sell any of such beverages in com- [fol. 20-10] bination with any other beverage at a single or joint price.

Second. In the event (a) of closing out the Distributor's stock for the purpose of discontinuing delivering any such beverages or, (b) that any of said beverages in Distributor's hands are damaged or deteriorated in quality, or (c) that Distributor has on hand any of said beverages after this agreement has been terminated, for any reason, Distributor shall, before offering any of said beverages for sale at prices less than the minimum resale prices fixed therefor, first offer to return such beverages to the Owner against payment therefor of an amount equal to the cost price thereof to Distributor, which offer to return such beverages to the Owner shall be made ten (10) days before such beverages shall be offered for sale at prices less than the minimum resale prices fixed for such beverages.

Third. Distributor will require from each Retailer to whom he may sell any such beverages a written agreement,

upon forms furnished by Owner, that such Retailer in turn will not resell, advertise or offer for sale the said beverages below minimum prices stipulated from time to time by Owner for resale thereof to Consumers.

Fourth. The minimum resale prices of said beverages by (a) Distributor to Retailer, and (b) by Retailer to Consumer, shall be in accordance with respective written schedules thereof furnished from time to time by Owner to Distributor, which schedules are to be considered a part of this contract. The schedule last delivered by Owner to Distributor shall govern the resale price at the time each particular resale is made and Distributor shall deliver promptly to all Retailers to whom he may sell said beverages schedules covering resale prices from Retailer to Consumer, which from time to time may be in force. Owner reserves the right to change the schedule of prices from time to time upon ten (10) days' written notice to Distributor.

Fifth. Distributor agrees that the Owner or its authorized representative shall have the right, from time to time, to make examinations of the books and records of the Distributor, for the purpose of ascertaining whether there has [fol. 20-11] been any violation or violations of the terms of this agreement, at such time or times as the Owner shall in its discretion decide.

Sixth. Distributor shall pay and discharge all costs, expenses and attorney fees which shall be incurred, or expended, by the Owner, in enforcing the terms and covenants of this agreement, whether by the institution of litigation or in taking advice of counsel or otherwise. In the event of a breach of this contract by the Distributor, it is agreed that it would be extremely difficult or impractical to fix the damages which may be sustained by the Owner by reason thereof, and the Distributor therefore agrees to pay to the Owner, as liquidated damages, the sum of Fifty ($50.00) Dollars for each breach of this contract, plus the amount by which the stipulated minimum resale price exceeds the price at which any of said beverages are sold. For the purpose of facilitating the payment of all costs, expenses and attorney's fees incurred in enforcing the terms and covenants of this agreement and the payment of any damages which may be sustained by reason of the breach of any of the covenants of this agreement, as herein pro-

vided, the Distributor hereby agrees to deposit with the Owner the sum of — Dollars, from which the Owner shall be authorized to recompense itself for all costs, expenses, attorney's fees and damages as herein provided arising by reason of any breach or breaches of this agreement. In the event the Distributor shall not violate any of the terms or covenants of this agreement, the Owner agrees to return the amount of money deposited by the Distributor hereunder, upon the termination of this agreement. In the event of any violation of any of the terms or covenants of this agreement, the Owner shall have the right to forthwith cancel the license of the Distributor to sell or distribute any of the products handled by the Owner. It is further agreed that the Owner, in addition to all other legal rights and remedies, shall be entitled to injunctive relief against any and all breaches of this agreement by the Distributor.

Seventh. This contract shall remain in full force and ef-
[fol. 20-12] fect for a period of one (1) year and thereafter until either party hereto shall cancel the same by giving to the other party sixty (60) days written notice to that effect by Registered Mail.

Eighth. This contract is made in pursuance of and by authority of the Fair Trade Act of the State of Illinois and shall apply only to the sales made within the State of Illinois pursuant hereto or to any agreement executed as provided in Paragraph Third hereof, of beverages located therein.

In witness whereof, the parties hereto have caused this contract to be executed the day and year first above mentioned.

Seagram-Distillers Corporation, by —— ——,
Owner. by —— ——, Distributor.

EXHIBIT 3 TO COMPLAINT

Seagram-Distillers Corporation,

20 North Wacker Drive, Chicago, Ill.

Distillers Since 1857

November Fifth, 1935.

DEAR SIR:

We are enclosing a schedule of minimum prices for the resale of Seagram and Kessler brands. This schedule has been issued pursuant to, and is a part of, the Fair Trade Contracts which we have entered into under the Illinois Fair Trade Act with Distributors and Retailers in Illinois.

As you are aware, these Fair Trade Contracts provide that our Seagram's Whiskeys and Gins and our Kessler's Blended Wiskeys shall not be sold, advertised or offered for sale within the State of Illinois below the minimum prices stipulated by us from time to time.

Section 2 of the Illinois Fair Trade Act reads as follows:

"Wilfully and knowingly advertising, offering for sale [fols. 20-13 & 20-14] or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

We wish you continued success in the distribution of Seagram and Kessler products.

Very truly yours, Seagram-Distillers Corporation.

[fols. 20-15 & 20-16]

EXHIBIT 4 TO COMPLAINT

Schedule of Retailers Cost and Selling Prices

Seagram's Whiskies and Gins

Illinois, October 29, 1935.

(This price list supersedes all previous Illinois price lists and is effective October 29, 1935)

(This schedule is issued pursuant to and is a part of Seagram-Distillers Corporation's Fair Trade Contracts with Distributors and Retailers in Illinois)

Brand	Quantity	4/5 Qts., 25.6 Oz. Cost to Retailer 12 Fifths	4/5 Qts., 25.6 Oz. Price per Bottle to Consumer	Quarts, 32 Oz. Cost to Retailer 12 Qts.	Quarts, 32 Oz. Price per Bottle to Consumer	Pints, 16 Oz. Cost to Retailer 24 Pints	Pints, 16 Oz. Price per Bottle to Consumer	Half Pints, 8 Oz. Cost to Retailer 48 ½ Pts.	Half Pints, 8 Oz. Price per Bottle to Consumer	1/10 Pts., 1.5 Oz. Cost to Retailer 120 Min.	1/10 Pts., 1.5 Oz. Price per Bottle to Consumer
Heavy Bodied American Type –BOTTLED IN BOND RYE WHISKEY: Seagram's Ancient Bottle Rye Age 5 Yrs.—100 Proof	Cases										
	1 to 4	$36.72	$3.89	$45.83	$4.87	$47.00	$2.49	$47.87	$1.27	$25.54	$0.27
	5 or more	34.94		43.62		44.72		45.55		24.30	
Seagram's Pedigree DeLuxe Rye Age 8 Yrs.—100 Proof	1 to 4	.....		$54.00	$5.74	$55.17	$2.93	.....		$29.64	$0.31
	5 or more	.....		51.37		52.49		.....		28.17	
Heavy Bodied American Type BOTTLED IN BOND BOURBON WHISKEY: Seagram's Bourbon Age 5 Yrs.—100 Proof	1 to 4	$35.79	$3.79	$44.67	$4.74	$45.83	$2.43	$46.71	$1.24	$24.96	$0.27
	5 or more	34.06		42.51		43.61		44.45		23.75	
Seagram's Pedigree DeLuxe Bourbon Age 8 Yrs.—100 Proof	1 to 4	.....		$54.00	$5.74	$55.17	$2.93	.....		$29.64	$0.31
	5 or more	.....		51.37		52.49		.....		28.17	
BOTTLED IN BOND CANADIAN WHISKEY: BOTTLED IN BOND Seagram's "83" Age 5 Yrs.—90 Proof	1 to 4	$34.27	$3.64	$42.91	$4.55	$44.08	$2.34	$44.96	$1.19	$24.08	$0.26
	5 or more	32.62		40.84		41.95		43.02		22.91	
Seagram's "V.O." Age 6 Yrs.—90 Proof	1 to 4	$36.26	$3.85	$45.25	$4.79	$46.41	$2.47	$47.29	$1.25	$25.25	$0.27
	5 or more	34.51		43.07		44.16		45.00		24.02	
BLENDED WHISKEY: Seagram's 5 Crown 90 Proof	1 to 4	$19.40	$2.15	$23.60	$2.59	$24.25	$1.35	$25.15	$0.69	$14.30	$0.16
	5 or more	18.49		22.50		23.11		23.97		13.62	
Seagram's 7 Crown 90 Proof	1 to 4	$23.15	$2.59	$28.20	$3.10	$28.85	$1.59	$29.75	$0.85	$16.60	$0.19
	5 or more	22.05		26.86		27.48		28.34		15.81	
Seagram's Crown Special 90 Proof	1 to 4	.....		$23.60	For Bar Use Only	.....		.....		.....	
	5 or more	.....		22.50		.....		.....		.....	
LONDON DRY DISTILLED GIN: Seagram's King Arthur 90 Proof	1 to 4	$10.75	$1.15	$13.15	$1.45	$13.85	$0.75	$14.82	$0.39	$ 9.15	$0.10
	5 or more	10.27		12.57		13.23		14.15		8.73	
Seagram's Superior 94 Proof	1 to 4	$13.26	$1.44	.....		$16.68	$ .89	.....		$10.59	$0.12
	5 or more	12.65		.....		15.92		.....		10.10	
Kessler's Blended Whiskies (Seagram-Distillers Corporation—Selling Agents)											
Kessler's Private 90 Proof	1 to 4	.....		$15.60	$1.77	$16.32	$0.93	$17.22	$0.49	.....	
	5 or more	.....		14.90		15.58		16.44		.....	
Kessler's Preferred 90 Proof	1 to 4	.....		$18.00	$1.98	$18.72	$1.04	$19.62	$0.55	.....	
	5 or more	.....		17.13		17.86		18.72		.....	

SEAGRAM—DISTILLERS CORPORATION
Room 932—20 North Wacker Drive
Chicago, Ill.
Telephone FRAnklin 5435

Quantity Prices apply to full case lots of assorted Seagram's and Kessler's brands only. Above Prices Include Illinois State Tax of $1.20 per case for 4/5 Quarts, $1.50 per Case for Quarts, Pints and Half-Pints and $0.75 per case for Miniatures.

[fols. 20-17–20-19] EXHIBIT 5

A photograph of a window of defendant's store at 208 West Madison street, Chicago.

EXHIBIT 6

A photograph of a window of defendant's store at 209 South Wabash avenue.

Summons.

Motion for temporary injunction filed November 19, 1935.

Appearance.

Verified answer of defendant filed November 21, 1935.

[fol. 20-20] Reply of plaintiff, filed November 21, 1935.

[fol. 20-21] Injunction writ.

[fol. 20-22] Decree.

Notice of appeal and proof of service thereof on plaintiff's counsel on December 2, 1935, filed by defendant December 5, 1935.

[fol. 20-23] Notice of filing præcipe for trial court record, and proof of service thereof on plaintiff's counsel on December 2, 1935, filed by defendant December 5, 1935.

Præcipe for trial court record filed by plaintiff on December 2, 1935.

Stipulation.

Certificate of evidence, filed January 4, 1936.

Statement of Evidence

Hearing on November 30, 1935, on plaintiff's motion for a temporary injunction. Present: Mr. Isaac H. Mayer and Mr. Richard Mayer, representing the plaintiff; and Mr. Irving Breakstone, representing the defendant.

COLLOQUY

The Court: The court wishes to be fully informed, and if the other side has not been paying any attention to the law in this matter until this morning, I will give them further time.

Mr. Richard Mayer: The only thing is we feel that we should have in the meantime, if the court please, inasmuch

as we have a contractual arrangement between the parties set up under oath, and not denied, and deliberate violation going on, causing irreparable injury, that we should have an understanding that during the time counsel is afforded this opportunity to study this question, we do not want these practices to continue.

The Court: That will influence the court in making the time as short as possible.

Mr. Breakstone: We would like an opportunity to answer.

Mr. Isaac Mayer: Are you willing to agree that you will not advertise and cut the prices in the meantime?

Mr. Breakstone: No. I have had no opportunity to talk with these gentlemen. I am familiar somewhat with the [fol. 20-24] price-cut cases in the dyeing and cleaning cases. And that is the way that I know about it.

The Court: You will have to answer, and argue it tomorrow.

Mr. Breakstone: We will have to file our answer by tomorrow and argue the case.

The Court: And argue it tomorrow.

Mr. Breakstone: All right. Tomorrow is Thursday.

The Court: Tomorrow at 11 o'clock.

Mr. Breakstone: We are to come in tomorrow at 11 o'clock.

Mr. Richard Mayer: In the meantime I understand that counsel does not agree that they will refrain from continuing these violations.

Mr. Breakstone: I can't agree to anything like that. I have not had the opportunity to talk with my clients, and I don't know what——

Mr. Isaac Mayer: Is there anybody here representing the company authorized to make such a statement?

Mr. Breakstone: No.

Mr. Isaac Mayer: You have been pointing to some gentlemen here.

Mr. Breakstone: This man happens to be a client of mine, and he is also a lawyer, who was interested in the dyeing and cleaning matter. The directors of the corporation are the proper ones to speak for the corporation.

Mr. Isaac Mayer: You made a remark a few moments ago, that this gentleman here called you into this case.

Mr. Breakstone: Mr. Greenspahn called me into the case. [fol. 20-25] Mr. Richard Mayer: Mr. Irving Greenspahn, you are a director of this company.

Mr. Greenspahn: I think I am.

Mr. Richard Mayer: And you are a vice president.

Mr. Greenspahn: I am at the present time,—I may be.

Mr. Richard Mayer: Mr. Samuel J. Greenspahn, you are secretary and treasurer of the defendant company.

Mr. Samuel Greenspahn: I am.

Mr. Richard Mayer: And you are Mr. Howard Blum, president of the company?

Mr. Blum: That is right.

Mr. Isaac Mayer: I think under those circumstances, with the president and officers of the corporation here they could make that statement.

Mr. Richard Mayer: And here are the directors, Howard Blum, Samuel J. Greenspahn, and Irving Greenspahn.

Mr. Breakstone: Well, this is to go over until 11 o'clock tomorrow.

The Court: One day won't make any difference——

Mr. Isaac Mayer: But it throws a little light upon the statement made by counsel when he said that he had no right to speak for the corporation, when all the directors are here in court, and particularly in view of his remarks that this contract sued on was not signed by the defendant.

The Court: I heard him the first time, and I heard him the second time, but I wish to be informed on this matter, and grant this day's delay, so that I may learn what the law is by those interested on both sides.

Mr. Richard Mayer: All right, your Honor.

(Adjourned.)

[fol. 20-26] Samuel J. Greenspahn, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Richard Mayer:

My full name is Samuel J. Greenspahn. I live at 3333 Washington boulevard and am 39 years old. I am secretary and treasurer of Old Dearborn Distributing Company.

I think I have acted as such about a year and three quarters. I believe that company—Old Dearborn Distributing Co.—was formed December 6, 1933. That is the defendant in this case. I am also a director of that company. I have the corporate minute book here and here it is.

Mr. Richard Mayer (to Mr. Irving Greenspahn): Your name is Irving Greenspahn?

Mr. Irving Greenspahn: Yes.

Mr. Richard Mayer: And you are a director of that company?

Mr. Irving Greenspahn: Yes.

Mr. Richard Mayer: And vice president of the defendant company?

Mr. Irving Greenspahn: Yes.

Mr. Richard Mayer: You have filed your appearance in this case, have you?

Mr. Irving Greenspahn: Yes.

The Witness: I guess Mr. Irving Greenspahn is a director of the company. He is one of my codirectors and the other director is Mr. Howard Blum. He is the president of the company. I think the company applied for a retail license to engage in the sale of alcoholic liquors at retail at 208 West *West* Madison street, Chicago, to the office of the Liquor Control Commission in the name of Old Dear- [fol. 20-27] born Distributing Company. I am pretty sure. I don't know if the company adopted any trade names. I may have signed applications for retail licenses at places other than 208 West Madison street. We applied for a store at 209 South Wabash avenue under the name of Old Dearborn Liquor Store—either singular or plural, I don't really know offhand. I believe the north side store at 3202 Lincoln avenue is operated under the name of Old Dearborn Liquor Store—either Store or Stores.

Q. Have you advertising matter available on these various stores in the form of cards?

A. I think so.

We own and operate, and have within the last three months, three different stores in the City of Chicago; one at 209 South Wabash avenue, one at 208 West Madison street, and one at 3203 Lincoln avenue. I am just through giving you the names. I told you there was the Old Dearborn Distributing Company on Madison, Old Dearborn

Liquor Store at 209 South Wabash avenue and an Old Dearborn Liquor Store at 3202 Lincoln avenue. I am sure that those stores are not operated under the name of Old Dearborn Liquor Stores, Inc. I have not, that I know of, seen the card marked Plaintiff's Exhibit 1, or a similar card at our store at 209 South Wabash avenue. I did not personally ever see any such card at that store. I hardly spend any time at that store. I spend most of my time at 208 West Madison.

Plaintiff's Exhibits 1 and 2 were offered and received in evidence. Plaintiff's Exhibit 2 is in words and figures as follows:

[fol. 20-28] PLAINTIFF'S EXHIBIT 2

209 So. Wabash Ave. Webster 1477.

Old Dearborn Liquor Stores Inc.

208 W. Madison St.—Dearborn 1770

Free Delivery

3202 Lincoln Ave.
Buckingham 1770

65 E. Van Buren St.
Webster 2646

Plaintiff's Exhibit 1 is a similar card received at defendant's store at 209 South Wabash.

I have not seen cards like Plaintiff's Exhibit 2 on different occasions around the store at 208 West Madison, where I spend all of my time. I haven't seen this type of card. I am not familiar with the cards. I don't even bother with them. I don't bother with them a bit. We might have them. It may be, but I don't know anything about them. I don't deny or affirm what cards are over there at all. I don't carry cards with me. I really can't tell if there are any cards of this type in the store at 208 West Madison street. I never saw any cards there such as Plaintiff's Exhibit 2. My duties as secretary and treasurer of Old Dearborn Distributing Company are to buy and sell, wholesale and retail. We have just one bank and keep it at the Terminal National Bank. Howard Blum and myself sign checks. Either one of us can sign.

Either Howard or I take care of paying the bills for the company. Either Mr. Blum or myself would pay for cards or advertising matter for the company.

Mr. Blum spends most of his time, I would say 75 or 80 per cent of his time, at 208 West Madison street. That is my signature, Samuel J. Greenspahn, secretary and treasurer, on Plaintiff's Exhibit 3. The words "Old Dearborn Liquor Stores, Inc." are right there. My signature is right there under those words.

[fol. 20-29] I didn't write "Old Dearborn Liquor Stores,"

The Court: I wish you would go to some other question.

Mr. Richard Mayer: May I take a moment's time, regardless of the explanation given by the witness, to explain the question?

The Court: I think you will have no trouble in establishing that they used that particular name.

Mr. Richard Mayer: No, sir.

The Witness: The concern known as Old Dearborn Liquor Stores, Inc., was doing business nowhere that I know of.

The Court: That is you are saying that because you don't happen to remember the "Inc."

A. No; I don't think we ever did any business anywhere under "Inc." I may be wrong. I don't think we did. When I signed Plaintiff's Exhibit 3 I was representing myself. Personally I was doing business for the corporation, Old Dearborn Distributing Company, at 208 West Madison Street.

Q. And at the time you were signing that contract did you have any business other than that which you were performing for the Old Dearborn Distributing Company?

A. Well, I may have made one or two outside buys for myself.

Q. Those had no connection with the execution of this agreement so far as you can now recall, did they?

A. No.

At the time this contract marked Plaintiff's Exhibit 3 was executed, the defendant, the Old Dearborn Distributing Company, was then operating the stores at 209 South Wabash avenue, 208 West Madison, and one on the north side on Lincoln avenue, and as far as I know there was no corporation had any existence under the name of Old Dearborn Liquor Stores, Inc.

[fol. 20-30] I believe I have been in the north side store once; I don't think more than that. Howard or I pay the

bills for the north side store. I never paid any bills for cards at the north side store to my recollection. I never saw a card like Plaintiff's Exhibit 7, showing Old Dearborn Liquor Stores, Inc., and showing 208 West Madison street and 209 South Wabash avenue. I may have been secretary and treasurer of a company other than Old Dearborn Distributing Company, but not of a company that had a name in any way similar to that company. At the time I signed that contract marked Plaintiff's Exhibit 3 I was not secretary and treasurer of any other corporation, other than Old Dearborn Distributing Company. Plaintiff's Exhibit 5, which is a photostat of a corporate form of application for a renewal license, has a copy of my signature. This covers the store located at 209 South Wabash avenue. That is my signature. I was executing that application on behalf of Old Dearborn Distributing Company and I gave the corporate name as Old Dearborn Distributing Co.

Q. Does this recall to your mind that the Old Dearborn Distributing Co. did operate under trade names of one kind or another?

A. Well, we had the name of Old Dearborn Liquor Store. They were just names of stores.

Q. They were the trade names of the business, were they not?

A. Yes, trade names of the business.

Plaintiff Exhibit 4 correctly shows my signature on the application for renewal of license to the State of Illinois for the store at 208 West Madison street. The trade name of the business used in the application was Old Dearborn Distributing Company. Plaintiff's Exhibit 6 is a correct [fol. 20-31] photostat of my signature on the original application for the store at 3202 Lincoln avenue.

Q. What is the name of the applicant written on that, to which you have fixed your signature?

A. Old Dearborn Liquor Store.

Plaintiff's Exhibits 4, 5, 6 and 7 were received in evidence:

Said Exhibit 4, consisting of application for renewal of retailer's license and also original application for said license, filed with the Illinois Liquor Control Commission in connection with its store at 208 West Madison Street, Chicago, Illinois; said Exhibit 5 consisting of application for renewal of retailer's license and also original application

for said license filed by defendant with the Illinois Liquor Control Commission in connection with its store at 209 South Wabash Avenue, Chicago, and in the application for renewal license it is stated that the trade name of applicant's business is "Old Dearborn Liquor Stores"; and in the application for original license it is stated that the business is conducted under the name "Old Dearborn Liquor Store"; Exhibit 6, consisting of application for renewal of retailer's license and also original application for said license filed by defendant with the Illinois Liquor Control Commission in connection with its store at 3202 Lincoln Avenue, Chicago, Illinois, and in both applications it is stated that the trade name of applicant's business is "Old Dearborn Liquor Store"; Exhibit 7, being a card similar to Plaintiff's Exhibits 1 and 2, received at defendant's store, 3202 Lincoln Avenue.

I don't know what goes on at 209 South Wabash. I was only there once. At 3202 Lincoln avenue I was there about once, that is about all. At 208 West Madison I haven't seen [fol. 20-32] those cards. I cannot say much about the other two stores. I don't know what they do or what they distribute. I haven't seen cards like Plaintiff's Exhibit 2 available for distribution or distributed at 208 West Madison street. I never buy any cards. Cards may be paid for out of the petty cash account. They may have come in and been paid for in cash right over the counter. I don't know a thing about that. Surely our company have cards, but I don't take care of the orders. I don't know the name of the printer. I have never ordered them.

The Court: They would hardly spring into existence by anything but an order, the business using the advertisement itself, I am speaking of it as being useful evidence, its own existence.

William Lloyd, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Richard Mayer:

My name is William Lloyd. I live at 4911 West Superior street. I am manager of the parking lot at 12 South Market

street in the City of Chicago,—public auto parking. I had occasion to go to the liquor stores at 208 West Madison street and 209 South Wabash avenue in the city of Chicago last Monday afternoon, November 18, 1935. I first went to 208 West Madison street. I went into the store and asked the clerk for Five Crown Seagram's Whiskey. He gave me a pint of whiskey and I asked him how much it was and he said $1.16 and I paid the man and I said, "Will you give me a receipt for the bottle of whiskey. I just bought,—I am buying it for another party and I want to be [fol. 20-33] sure I get my money back." And the fellow said "O. K." and he made out a receipt and gave me a duplicate of it and said,—it said: "1 Pint of Five Crown Seagram, $1.16," with the heading of the company on it, and I said to put the date on it, and also sign it, so the receipt he gave me was the duplicate, and he signed it with pencil. He made the duplicate and signed it with pencil, and gave me the receipt. I went back and gave it to the party who asked me to buy it and he said, "Did you get any advertising in there? And I says that I forgot; I didn't see anything on the counter. But I went back to the store and asked the clerk if he had any cards; that they were getting it for out-of-town people, so he gave me about a dozen or fifteen or twenty cards, and I brought them back and gave them to the party who sent me.

I gave them to Mr. McCray, who is sitting in the court room.

(The cards referred to by the witness were marked Plaintiff's Exhibit 2-A to 2-E, inclusive, for identification.)

Plaintiff's Exhibit 8 is a wrapper with the name on it, "Old Dearborn" and with the two stores, 208 West Madison and 209 South Wabash avenue marked on it. Plaintiff's Exhibit 9 is the receipt that I have been referring to, and the signature I refer to is on that receipt. Plaintiff's Exhibits 2-A, B, C, D, and E, and a batch of other similar cards are the ones which I got at 208 West Madison street. They were at the north end of the counter, next to either the cash register or an adding machine. They were lying right there on the counter. At the time I got those cards I got a bottle of Seagram's Five Crown Blended whiskey, [fol. 20-34] such as the bottle you now have in your hand, in a wrapper such as Plaintiff's Exhibit 8.

Mr. Mayer This is Seagram whiskey.

Plaintiff's Exhibits 2-A to 2-E, inclusive, and Plaintiff's Exhibit 8 were received in evidence. Said Exhibits 2a to 2e, inclusive, being cards identical with Plaintiff's Exhibit 2 and said Exhibit 8, being a wrapper on which is printed "Old Dearborn Liquor Store," and the address 208 West Madison Street and 209 South Wabash Avenue.

I went back to work and about an hour later Mr. McCray came in again and asked if I had a half hour's time to make another trip, and I said sure, and he took me in his car to 209 South Wabash, and I went in there and repeated the same thing. I asked the clerk for a bottle of Five Crown Seagram whiskey, and he gave me the bottle, and I asked for a receipt, and he gave it to me, receipted it, and gave it to me, and there were cards lying on the counter. I picked those up and came out with the package, and the receipt and the cards, to Mr. McCray and gave it to him. The price was $1.16 a pint. That was the same price I paid at 208 West Madison street. Plaintiff's Exhibit 10 is a receipt I got for the Seagram's Five Crown whiskey at 209 South Wabash avenue. Plaintiff's Exhibit 9 is the receipt from 208 West Madison. Number 10 is the receipt from 209 South Wabash.

Plaintiff's Exhibits 9 and 10 were offered and received in evidence. (Said Exhibit 9, being a receipt from defendant's store at 208 West Madison Street, Chicago, Illinois; said Exhibit 10 being a receipt with the caption "Old Dearborn Liquor Stores" at the top and with the following addresses: 208 South Wabash Avenue, 208 West Madison Street, 3202 Lincoln Avenue and 1606 Belmont Avenue.)

[fol. 20-35] The large number of cards just produced by the witness Lloyd are the same as Plaintiff's Exhibit 1 and Plaintiff's Exhibit 2-A, B, C, D, and E, and a large number not marked are the same as Plaintiff's Exhibit 2.

I bought a pint bottle of Five Crown whiskey at 209 South Wabash.

Cross-examination.

By Mr. Breakstone:

I am 22 years old. The gentleman who came to get me to make these purchases was Mr. McCray. I knew that he was with the Seagram-Distillers Corporation, the plaintiff in this case. I have known him two or three months.

I had made purchases for him at other places than the defendant liquor stores. McCray asked me if I would do him a favor and I said sure I would be glad to, and he told me what he wanted and I went and did it. He asked me if I would go over to the Old Dearborn Liquor Store and buy a pint bottle of Seagram whiskey and get a receipt, with the date, and have it signed by the clerk, and also whatever the amount was that it cost, and the receipt, and also to pick up any advertising matter that I saw there.

He gave be the money to buy the whiskey. I think it was $2. for the purchase at 208 West Madison. I paid $1.16. Mr. McCray didn't pay me anything for doing this work. I gave him back the change and delivered the whiskey. Mr. McCray didn't tell me the purpose for which he wanted me to make the purchase. That was in the afternoon of November 18. On the second purchase we were going over to 209 South Wabash and I said, "What are you buying the whiskey for; I thought we were working for the liquor [fol. 20-36] trust." And he said, "I was just checking up on the prices of them." I said, "O. K." It is none of my business what he wanted to buy the whiskey for. McCray gave me the money to buy the whiskey at 209 South Wabash at the Old Dearborn Distributing Company. He did not pay me for my services there. I haven't been paid any money by anybody for my services in this case. The purchases were made for McCray and I knew at the time that McCray told me he was checking up on the prices that Seagram whiskies were being sold by this Old Dearborn Distributing Company and my services were being rendered to McCray wholly as a favor.

Plaintiff's Exhibits 11 and 12 were offered and received in evidence. Said Exhibit 11 being a certified copy of the certificate of incorporation of plaintiff and said Exhibit 12 being a copy of plaintiff's application and certificate of authority to do business in Illinois.

CLARENCE G. MCQUAIDE, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Richard Mayer:

My full name is Clarence G. McQuaide. I live at 80 Northfolk road, Clarendon Hills, Illinois. I am western manager of Seagram-Distillers Corporation, the plaintiff in this case, which first began to do business in the State of Illinois approximately June 29, 1934. Its business is the sale and distribution of Seagram's products, which bear trade-marks, brands or names. I refer to Seagram's Pedigreed Rye and Bourbon, Seagram's Ancient Bottle; Seagram's bourbon; Seagram's V. O., Seagram's 83, and Sea-[fol. 20-37] gram's Five and Seven Crown. The latter are blended whiskies. The first named are bonded whiskies. Also Celebrated and Seagram's King Arthur gin; Kessler's Private and Kessler's Preferred. The latter are blended. Each of these brands to which I have referred differ materially one from the other. They each carry trade-marks, names or brands distinctive as to each particular one. These beverages distributed by my company are sold under those brands, names and trade-marks in the State of Illinois, since the date I have mentioned.

They are sold in standard size bottles and containers. They run, four-fifths, quarts, pints, and half pints. The producers of these Seagram's and Kessler's whiskies are Joseph E. Seagram & Sons, Inc. and Joseph E. Seagram & Sons, Ltd. Each of these beverages or brands are in competition with commodities of the same general class produced by persons other than those I have just named here. The names of some of the competing brands are Old Granddad, Old Taylor, Hiram Walker's DeLuxe Rye, Hiram Walker's makes bourbon, rye, and Canadian whiskies. Those are in competition with the Seagram products. There are other Canadian whiskies that are sold in competition with Seagram whiskies here in Chicago. The United Distillers, Limited; that is a Canadian company younger in distribution in the state, however, and less known. There is also G. & W., which is a Canadian whiskey.

Seagram-Distillers is a Delaware company. It is a sales company for all Seagram's products, whether distilled here in this country or in Canada.

The names of some of the American distilled whiskies that are constantly in competition with the different Sea- [fol. 20-38] gram brands are Old Granddad and Old Taylor, made by the American Medicinal Spirits. There are easily more than fifty different brands of whiskies on the market in the City of Chicago, all of which are in competition one with the other and with the Seagram products that I have referred to.

The plaintiff has expended large sums of money in connection with the sale and distribution of these Seagram products in the State of Illinois. I would say around $200,000 has been spent in advertising Seagram products since the first of this year in the State of Illinois. I would say that approximately $2,000,000 has been spent since the first of this year in advertising Seagram products nationally, in addition to that which has been spent merely in the State of Illinois.

There are five whiskey manufacturers other than Seagram whose products are in competition with Seagram's products here in the City of Chicago and State of Illinois. There are many more producers than that, but there are certain ranges that are considered most competitive, and I would say that in that group there would be approximately five.

It is impossible to estimate the number of producers in addition to those particular ones. It would depend on how far down I went. If we included the rectifier who blends young whiskies as distinct from distilling. They buy distilled liquor and then blend it. These whiskies that are the result of rectifying as distinct from distilling are also in competition with Seagram brands.

Since the plaintiff has been operating in the distribution of Seagram products in the State of Illinois, it has been the sole person, firm or corporation that has been authorized [fol. 20-39] to regulate and control the distribution of Seagram and Kessler whiskies in this state and in the City of Chicago.

In operating our business in the City of Chicago and State of Illinois, we sell to wholesalers only. The wholesaler or jobber then sells to the retailer. At the present

time we have twelve wholesale distributors in the City of Chicago. During all of the period of time covered by the complaint in this case, we had that number, and for the last couple of months. The defendant is regarded as a retailer, although in some cases it may be operating as a wholesaler; but actually it is operating three retail stores mentioned here. The plaintiff does not sell directly to the Old Dearborn Distributing Co.

I am familiar with the Illinois Fair Trade Act. Since its enactment the plaintiff has executed contracts under it with all of its distributors in the State of Illinois, and since the middle of October every one of these distributors has been operating under one of those Fair Trade contracts. Since the middle of October, 1935, the plaintiff has not sold or distributed any Seagram's products that were not subjected to these contracts. Exhibit 2 to the complaint is one of the Fair Trade contracts with distributors, which has been in force with every one of our distributors in the State of Illinois since the middle of October. The company has executed contracts with retailers in addition to the type executed with distributors.

Plaintiff's Exhibit 1 attached to the complaint is the form of contract which has been executed with numerous retailers throughout the state. I personally had nothing to do with the actual execution of Plaintiff's Exhibit 1, by the Old Dearborn Distributing Co. Since the middle of Octo-
[fol. 20-40] ber, 1935, the plaintiff has not sold or distributed any Seagram products that are not subjected to these contracts which I have just referred to. None of Seagram's products that have been referred to here this morning are now sold by the plaintiff excepting under these Fair Trade contracts; that is, Plaintiff's Exhibit 2 to the complaint, the distributors contract, and Exhibit 1 to the complaint, the retailers contract.

The effect of the defendant's price cutting as to others who have signed these Fair Trade agreements with the plaintiff would have the effect of causing them either to cut to meet the present prices or to shelve the merchandise,—curtail its sale.

Cross-examination.

By Mr. Breakstone:

The plaintiff corporation is merely a sales agency and not manufacturers of liquor. They are not producers. The

producers of the liquor in question here are two corporations named Joseph E. Seagram & Sons, Ltd., and Joseph E. Seagram & Sons, Inc.

I don't know the facts definitely as to whether both of those corporations are Canadian corporations. They are not licensed to do business in Illinois. Seagram-Distillers Corporation, the plaintiffs, is licensed to do business in Illinois.

Seagram-Distillers Corporation buys its liquors that are described in the complaint from Joseph E. Seagram & Sons, Inc. and Limited. I know that of my own knowledge. Those sales are consummated at our executive office in New York City. When the plaintiff sells merchandise to a distributor here in Illinois, the merchandise is produced in various places; some in the United States, in Lawrenceberg, Indiana.

[fol. 20-41] The plaintiff, or the Seagram, Ltd., or Seagram, Inc., do not have any producing plants in the State of Illinois. All the whiskeys and liquors that are described in the complaint are produced outside the State of Illinois and sold to the Seagram-Distillers Corporation, and they are delivered to the Seagram-Distillers Corporation, which takes delivery of them right here in Chicago. There is a warehouse maintained for the purpose. The plaintiff corporation has a warehouse here in Chicago. All of these liquors are shipped into that warehouse from Seagram, Ltd., or Seagram, Inc. Bills of sales are exchanged; definite billing is rendered through Seagram-Distillers Corporation. I don't know anything about exchanges of cash for this purpose between these corporations. We remit all funds to our executive office. This merchandise shipped in here, into the warehouse in Chicago, is paid for at the New York office.

The plaintiff never sold any liquors directly to the defendant. The plaintiff does not handle liquors other than those described in the complaint, except possibly as a clearing house for some merchandise being closed out by a former subsidiary corporation.

None of the Seagram brands named, none that are sold or controlled by Seagram-Distillers Corporation, were sold by the plaintiff directly to the defendant.

Between October 8th and October 21st of this year we sold the defendant, for the Hillcrest Distilling Corporation,

a close-out of a subsidiary. It was not our merchandise. It was merchandise of the Hillcrest Distilling Corporation.

(Defendant's Exhibits 1 to 10 marked for identification.)

[fol. 20-42] I recognize these exhibits as the statements of accounts between the plaintiff and the defendant corporation. The plaintiff had business dealings with the defendant directly concerning brands that were the property of a former company, the Hillcrest Distilling Corporation.

We have a man by the name of Mr. Maas in our employ. I recognize his signature on Defendant's Exhibit 10. I never had any dealings myself directly with any officers of the defendant corporation. I know Mr. Samuel J. Greenspahn. I had no dealings with him with reference to the negotiations of this contract referred to as Exhibit 1 to the complaint. I had no negotiations with him at all. I am under the impression it was Mr. Maas. I don't recall if this contract referred to as Exhibit 1 in the complaint was signed by him before or after Mr. Greenspahn signed it.

There are no contracts similar to the Fair Trade contracts with distributors and retailers existing between the plaintiff and Seagram & Sons Limited or Seagram & Sons, Inc.

At the time of the execution of this Fair Trade contract with the defendant, I knew nothing personally of the negotiations that went on. There is no other Seagram merchandise such as is described in the complaint, that I know of, that is held for sale by jobbers and/or wholesalers who have acquired the same other than directly from us.

The labels on the merchandise we sold or cleared for the Hillcrest Distilleries were labels of the Hillcrest Distilling Corporation. I could not say if there are any jobbers in Chicago that have stocks of Seagram that they have acquired other than from the plaintiff. I could not tell you if [fol. 20-43] there is any Seagram merchandise here that has been acquired by persons other than those in contractual relationship with us or the two Canadian companies. In the course of my management of the corporation I have not run across any such stocks being offered for sale in this community. Schenley products are in competition with Seagram's in this community. There are absolutely no contractual relations between Seagram-Distillers Corporation and any other corporation engaged similarly in the sale of products in Chicago at fixed prices. The only price-fixing

contracts that I know about are those mentioned in the complaint.

I know of a firm in Chicago called the Pioneer Distillers. They are distributors of Seagram products. I know of the Roxy Liquor Company. They are sub-distributors under one of the twelve key distributors. I can't tell you without checking if the Roxy Liquor Company has executed a distributors or retailers contract. We have contractual relations with our distributors and they control the redistribution.

Seagram-Distillers Corporation has not sold any other beverages or liquor to the defendant other than that described in Defendant's Exhibits 1 to 10. Plaintiff does not sell merchandise directly to retailers. Exhibits 1 to 10 were sold to the wholesale division of the company named. We have never had a distributors' contract with the defendant corporation.

By price cutting I mean any price below that named by the owner of the brand. By that I mean any price below that set up in the minimum schedule of prices fixed by Seagram-Distillers Corporation.

The Court:

[fol. 20-44] Q. When you said you were not selling to the defendant the Seagram brands, you had in mind that you were selling the Hillcrest brand, is that it?

A. Yes; Hillcrest was a former corporation, subsidiary to Seagrams, and was closed out, and the license was withdrawn from the Hillcrest corporation.

Q. Now in this contract, that is Exhibit 1 in this case, I thought it was a contract referring to the Seagram brand. Was it, or was it not, signed by Maas?

A. No, it was Hillcrest brands; the brands had been discontinued, and the corporation discontinued; and Hillcrest owned the labels.

Mr. Breakstone:

Q. Mr. McQuaide, you stated that the effect of the sales by the defendant below the prices fixed by your corporation curtailed the sale of liquor by Seagram-Distillers, Incorporated; is that true?

A. Yes, sir.

Q. How do you know that as a fact?

A. By, oh, some twenty years of experience in merchandising. No man——

Q. Well, have you.

Mr. Isaac Mayer: Let him finish.

Mr. Breakstone: Pardon me. I did not mean to interrupt you. Go ahead, Mr. McQuaide.

The Witness: No man can interest himself in the sale of merchandise unless he makes a living wage.

Q. Well, I do not want to go into that.

A. We have set up our profit according to the best opinions of what a living wage is for a retailer and——

Mr. Breakstone: That is beyond the purview of the question. I do not want that.

Mr. Richard Mayer: You asked him for that.

The Court: He has not answered the question.

The Witness: I don't have the records of the plaintiff's [fol. 20-45] sales here in Chicago for the month of November. I would say that our sales the 14th, 15th and 16th of November up to that period will be less than the 14th and 15th of November last year. The sales from that period on to the end of this month, to date,—I know they are less than they should be in comparison with last year's volume. I claim that is due to the effect of the cuts of the defendants here in selling at the prices they are charging. It lessens the demand for our products by the distributors. It also lessens the demand for the products by the consumer. The consumer questions whether he is getting good Seagram whiskey or whether he is getting not so good, whether the quality of the product is there, and he hesitates to buy it.

By Mr. Breakstone:

Q. As a matter of fact, don't the retailers sell this liquor at lower prices in order to effect larger volumes?

A. They sell it many times at lower prices in order to meet the competition with which they are faced in a given neighborhood.

Q. But don't they do it also to increase their sales?

A. Not by any manner or means does that necessarily follow. They use it on the principle of the loss leader, which enables them to bring people into their store and sell some other products, to the detriment of the particular product advertised.

Q. And is that practice indulged in by the defendant here, using this liquor as a loss leader?

A. That I could not say.

Q. When you say using your Seagram liquor as a loss leader, you mean selling it below cost, don't you?

A. Not necessarily; selling it at any profit, at any price less than that named by Seagram-Distillers. The price of the Five Crown blended whiskey should have been $1.35 a pint. It was sold by the defendant at $1.16. I don't [fol. 20-46] know the prices the defendant paid for this liquor when they bought it.

Q. When you say they sell it as a loss leader, the word "loss" does not imply that they are selling it below cost?

A. No, sir. They may sell it at some figure over their cost, but still not sufficient to cover their overhead, which would still result in a net loss.

Q. Well, it is only a confusion in the terms. There would be a loss there?

A. Standard practices are followed in setting up a markup for retailers and wholesalers. I think the markup, according to statistics established through years of various products, will show a retailer needs 33⅓ per cent profit in the merchandise he invests his money in, in order to pay his bills, keep the rent paid and have a livelihood from the store. We have only set what we believe to be a normal profit, which is approximately 33⅓ per cent. Anything he sells under that figure we maintain is sold at a loss to him.

Q. In other words, you fix prices so as to determine the profit that you think the retailer ought to get?

A. To help him make a profit and stay in the business.

Q. You arrive at the cost that each retailer must sell his product at by taking a hypothetical cost of doing business among retailers over a large area, don't you?

A. We use that merely as a guide.

Q. In a hypothetical case?

A. We use it merely as a guide.

Q. You do not take the actual cost——

The Court: How could he? Go to some other question, please.

Mr. Breakstone: All right, your Honor.

The Witness: It is impossible.

[fol. 20-47] CLARE L. MCCRAY, a witness called on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Richard Mayer:

My full name is Clare L. McCray. I reside at 1515 East 63rd street. I am a salesman for Seagram-Distillers Corporation. I had occasion to visit the store operated by the defendant at 208 West Madison street on Saturday, November 16th.

I made a purchase of liquors at that time and obtained a receipt therefor. I also picked up a card which laid on the counter in a small box.

(Plaintiff's Exhibits 13 and 14 marked for identification.)

I went to the store at 208 West Madison street between 9:15 and 9:25 A. M. I went into the store and the man that approached me, I asked him what he would suggest in a good bottle of whiskey. He suggested to me Canadian Club, Walker's Canadian Club at $1.89 a pint; also Walker's Peacock 7-year old brand, a pint $1.49, I think it was, $1.89. I am not positive of that; and also two or three other brands. I just cannot remember the names.

At that time I asked for a bottle of Seagram's Ancient bottle Rye. I inquired what it was, and the answer was that it is real rye and bourbon mixed. I asked what the difference was between rye and bourbon and I was told "very little." I had inquired as to what the price was and I was told it was $2.29, on sale that day, a special sale they were having on it. In fact, it was marked down at that time to $2.29. Then I asked what V-O was, as to the age, [fol. 20-48] and I was told it was 6-year old whiskey, straight Canadian, at $2.08 a pint; so I made up my mind to take two pints, one Ancient Bottle Rye and one V-O. The man wrapped it up. I asked if I could get a receipt and he said, "Surely." Plaintiff's Exhibit 14 is the receipt that he gave me. Plaintiff's Exhibit 13 is the card that I got from that store at that time.

(Plaintiff's Exhibits 15 and 16 were marked for identification.)

Plaintiff's Exhibits 15 and 16 are the Seagram Ancient Bottle Rye and the Seagram's V-O that I bought there that

morning. That is Seagram merchandise, and the carton in which that bottle, Seagram's Ancient Bottle of Rye is contained, is in the same shape as it was in when I got it there that morning. The name Old Dearborn Liquor Stores at the top of it was there. The same is true with reference to the V-O. That is Seagram merchandise.

I heard Mr. Lloyd testify concerning purchases at 208 West Madison and 209 South Wabash. The two bottles which he purchased and which he identified here this morning are Seagram products; that is, the plaintiff's. The names, labels, and trademarks appearing on those bottles I have just identified are the trade marks, names and labels of the plaintiff corporation, under which the plaintiff corporation sold Seagram products and which were purchased from the defendant at the time I have just referred to.

(Plaintiff'- Exhibits 13, 14, 15, 16 and 16A, and said Exhibit 13 being a card identical with Plaintiff's Exhibit 2, and said Exhibit 14 being a receipt from said store with [fol. 20-49] the caption "Old Dearborn Distributing Co.", and the address 208 West Madison Street at the top of said receipt. Plaintiff's Exhibits 15, 16 and 16a, being bottles of Seagram's Ancient Bottled Straight Rye Whiskey, Seagram's V. O. Rare Old Canadian Whiskey and Seagram's Pedigree Straight Rye Whiskey, respectively, were offered and received in evidence.)

I went back to the store on West Madison street that Saturday morning around eleven o'clock A. M. with Mr. Melick, who also worked for the plaintiff. I saw Mr. Samuel Greenspahn, who is sitting here in the courtroom now. There was a conversation between him and Mr. Melick and myself.

As we entered the store we asked for one of the proprietors or directors or executives, Mr. Howard Blum. We were told he was not in, but Mr. Greenspahn was in the rear of the store. This information was given us by Mr. Harry Brown. We approached Mr. Greenspahn relative to the cutting of prices of merchandise. We told him we were very much interested in him maintaining the prices; in other words, the corporation or the company he was representing maintaining prices. We had introduced ourselves before. He said he was not interested in what Seagram-Distillers wanted him to do. We merely mentioned that he had signed a contract with us relative to that, and

we wanted him to live up to it, which he stated that he did not care to do. At that time Mr. Melick asked him if he had received one of the letters through the mail with our current price list attached, and he said he had.

Exhibits 3 and 4 to the complaint are the letter and the price list to which I have reference.

After Mr. Melick made that inquiry, Mr. Greenspahn [fol. 20-50] responded that he had received one. He did not particularly pay any attention to it, as to our knowledge. We also asked him or insisted at the time that he change his—take the sign down on which his prices were shown.

At that time we had with us additional copies of that letter and price schedule. Mr. Melick handed an additional copy of Exhibits 3 and 4 to the complaint to Mr. Greenspahn. After handing those to Mr. Greenspahn we were told that nothing would be done; he would not take the sign down or discontinue cutting prices. The sign that I have reference to on the window is shown in the photograph marked Exhibit 5 to the complaint. As we were leaving, at that time, we again asked Mr. Greenspahn if he would consider maintaining his prices. He said no, absolutely not, he would not.

On the same day, November 16th, last Saturday, I visited the store at 209 South Wabash avenue. I was accompanied by Mr. Melick. It was between 1:00 and 1:30 in the afternoon. We made a purchase, paid for it, and got a receipt, which is Plaintiff's Exhibit 17. The name on the top of that receipt is Old Dearborn Liquor Stores. I bought a pint of Ancient Bottle, a pint of Seven Crown, a pint of Five Crown; paid $1.13 for the Five Crown, $1.39 for the Seven Crown; paid $2.29 for the Ancient Bottle.

Plaintiff's Exhibit 17 was offered and received in evidence, being a receipt received from defendant's store at 209 South Wabash Avenue, Chicago, with the caption "Old Dearborn Liquor Stores," and the addresses 209 South Wabash Avenue, 208 West Madison Street, 3202 Lincoln Avenue and 1606 Belmont Avenue at the top.

[fol. 20-51] I visited the store at 3202 Lincoln avenue, which has an additional address, 1606 Belmont avenue, on Monday, November 18, 1935. I made a purchase, obtained a receipt, and got a small card. Plaintiff's Exhibit 18 is the receipt. Plaintiff's Exhibit 7 is the card that I got at the store, bearing the name Old Dearborn Liquor Stores,

Inc., stating that there are other stores operated by the company in the Loop, mentioning 208 West Madison Street and 209 South Wabash avenue.

Plaintiff's Exhibit 18 was offered and received in evidence, being a receipt received from defendant's store at 3202 Lincoln Avenue with a caption identical to that contained in Plaintiff's Exhibit 17.

Cross-examination.

By Mr. Breakstone:

The plaintiff did not furnish me with the money to make the purchases. I purchased them out of my own pocket and was reimbursed by the plaintiff for the money so expended. I was not instructed directly by my superiors to make these purchases. Mr. Mayer, one of the attorneys for the plaintiff corporation, instructed me to make these purchases.

Mr. Richard Mayer: That is all, Mr. McCray. Just a moment.

Well, I have all of these bottles for these purchases, and I can line them up if counsel wants to check them and see and identify them, but possibly we can save time by counsel recognizing they are the particular Seagram brands.

Mr. Breakstone: And the bottles purport to bear on the face the Seagram labels.

Mr. Richard Mayer: Without stopping to identify any particular one.

[fol. 20-52] Mr. Breakstone: Any bottle that you produce, I will stipulate.

Mr. Richard Mayer: And they are bottles that were purchased at these various stores.

Mr. Breakstone: And the containers.

Walter E. Maas called as a witness on behalf of the plaintiff, testified as follows:

Direct examination.

Mr. Richard Mayer:

I live at 5328 North Spaulding avenue, Chicago, and am general office manager for plaintiff. I saw Samuel J.

Greenspahn sign the document identified as Plaintiff's Exhibit 3 at my desk at plaintiff's office in Chicago on August 14, 1935, the date it bears.

The Court: What happened in connection with the contract, if anything, outside of the signing; was it in connection with the purchase by the defendant?

A. We had some of the close-out merchandise which was referred to by Mr. McQuaide, of the Hillcrest Corporation, and we have had some difficulties with Mr. Greenspahn's corporation.

Mr. Richard Mayer: The court is inquiring as to Plaintiff's Exhibit 3, and the execution of it.

The Witness: It was signed at that time because he was going to go along with us, and would purchase our Seagram products from correct sources and maintain prices. That is the reason.

(The aforesaid document was received in evidence as Plaintiff's Exhibit 3, which document is identical with Exhibit 1 to the complaint as set forth in full on pp. 6-8, supra.)

[fol. 20-53] Cross-examination.

By Mr. Breakstone:

Q. At the time Greenspahn signed this contract, which was in August of 1935, he did not buy any liquors from your company, did he?

A. We were negotiating for a sale of this Hillcrest merchandise.

Mr. Breakstone: I ask that the question be repeated, I do not think you understood it. That is capable of a yes or no answer.

(Question read.)

A. At the moment I would say no.

Q. Well, he did not buy any liquors in the entire month of August, from you, did he?

A. I would have to check the records.

Q. Well, will you check the records and inform us?

A. Yes, sir.

Q. Did Mr. Greenspahn, or did the defendant corporation here ever buy any Seagram whiskies or any of the

whiskies such as have been described in the complaint here, from the plaintiff corporation?

A. No, sir.

Q. Then you will say that in the month of August they never bought any of the liquors described in the complaint here from you——

A. That is correct.

Q. (Continuing.) —the plaintiff corporation?

A. That is correct.

Q. You did not?

A. You question was as to the liquors.

Q. All right. Any of the liquors described in the complaint, they never bought any?

A. That is right.

Q. They never bought any liquors from the plaintiff corporation either before or after they signed this contract of the nature described in this complaint and in this lawsuit?

A. That is correct.

[fol. 20-54] Q. But they did, in October, buy some other merchandise other than the liquors described in the complaint, from your corporation?

A. That is correct.

Mr. Breakstone: That is all, Mr. Maas. Just one second.

Q. Showing you Plaintiff's Exhibit 3, Mr. Maas, was that signature typewritten in there when the contract was signed, Old Dearborn Liquor Stores, Inc.?

A. Yes, sir.

Q. And was that typewritten signature put on there at your desk?

A. Not right at my desk. The whole document was filled out, executed, except for the signatures, the written signatures.

Q. Was all the typewriting that appears on this contract done in your office?

A. Yes, sir.

Q. I mean the company's offices?

A. Yes, sir.

Q. Was this signature, Old Dearborn Liquor Stores, Inc. put on there on the typewriter, in the plaintiff corporation?

A. Yes, sir.

PAUL PAGETT, called as a witness on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Richard Mayer:

I live at 4641 North Menard, Chicago, and am a salesman for plaintiff. For the last three or four months I have been assigned to loop territory. I have gone into the stores operated by defendant at 208 West Madison, Chicago, and 209 South Wabash avenue, Chicago, have met and talked with all of the officers of defendant. It was my duty to call upon the neighboring stores and others in the vicinity of the stores now operated by the defendant for the purpose of selling whiskey sold by defendant.

Q. Let me put this question to you: Did you personally [fol. 20-55] observe any effect at any time of the cutting of prices by the defendant at any of those stores in the loop?

A. Yes, I did.

Q. What was that effect?

A. Well, the effect was the neighboring stores—that is, I am speaking now of the liquor stores, they were hiding our merchandise and doing everything possible but to promote the sale of our product because of the cutting of the prices by the defendant.

Q. Were there any instances where stores in that neighborhood who had maintained the prices stipulated by Seagram-Distillers Corporation, cut their prices after the cutting by the defendant at its stores?

A. Yes, there were several that cut their prices to the defendant's prices, as well as those that refused to sell it, but simply hid the merchandise, refused to sell it at that price.

The Court: You will have to be specific, or it will be stricken.

Mr. Richard Mayer:

Q. Can you specify any particular places where any of that actually occurred, to your personal knowledge?

A. Yes.

Q. Name them.

A. I believe I can name a few of the stores, Joe Grein & Pahls is one. Ladner Brothers is another.

Mr. Breakstone: What was that name?
A. Ladner Brothers, and Silvers.

Cross-examination.

By Mr. Breakstone:

Q. Now, Grein & Pahls handle a large number of brands of liquor that are in competition with Seagram, do they not?
A. That is right.
Q. And what do you mean that Grein & Pahls hid Seagram's merchandise that they had in stock?
[fol. 20-56] A. I did not say that Grein & Pahls had hid their merchandise.
Q. Well, did Ladner Brothers hide their merchandise?
A. Yes, they did.
Q. Where did they hide it?
A. It was on one of the lower shelves.
Q. It was not prominently displayed, in other words?
A. That is right.
Q. But it was for sale in the store?
A. Well, yes, if a person really wanted it, why, I suppose they would sell them one, but only at the regular price.
Q. If a person went into Ladner Brothers and called for Seagrams it was there for sale, they could get it couldn't they?
A. That is right.
Q. That is true of Silvers and Grein & Pahls, isn't it?
A. That is right.
Q. When you say that do you know whether or not sales in any of these establishments were more or less at or about the time that you have testified, as the result of lower prices charged by competitors?
A. Well, I can truthfully say they were decidedly less.
Q. Well, do you know?
A. Yes.
Q. How many bottles of Seagram whiskies was Grein & Pahls selling in a day, at or about the time the defendants were selling these products at the prices they did?
A. I am not at all familiar with their sales of our products by the day.
Q. Well, by the month?
A. I am only familiar with the orders that I may receive from week to week, to replace merchandise that they had sold.

Q. It was your job to know the extent of their sales by the number of repeat orders they gave you?

A. That is right.

Q. You do not know whether Grein & Phals bought these [fol. 20-57] whiskies from distributors other than yourself, do you?

A. Well, it so happens that Grein & Phals——

Q. Do you know? That is simple?

A. Yes, I do.

Q. You do know?

A. Yes.

Q. Well, did they buy any whiskey from distributors other than yourself?

A. No, sir.

Q. They did not?

A. No.

Q. How about Ladner Brothers?

A. No.

Q. How about Silvers?

A. No.

Q. The only Seagram merchandise that any of those people ever bought came through you?

A. Came through us, our authorized distributors.

Q. I am talking about yourself.

A. All of their orders?

Q. Yes.

A. No, not all of them, in case of all of the stores.

Q. Do you know all of the distributors of Seagram products in Chicago?

A. I know most of them, yes.

Q. Do you know all of them?

A. I will not say that I know all of them, no.

Q. You do not know, then, of your own knowledge do you, whether or not Grein & Phals, and these other two concerns bought from distributors of which you have no knowledge?

A. Well, in the two cases I could say yes, sir.

Q. That they did?

A. That they did not buy from any but authorized distributors.

Q. Well, are there any unauthorized distributors of Seagram products in Chicago?

A. Not to my knowledge.

Q. To your knowledge, are there any people who are selling Seagram merchandise here who are not distributors appointed by the plaintiff corporation?

[fol. 20-58] Mr. Isaac Mayer: You mean other than retailers, I presume?

Mr. Breakstone: Yes, other than retailers.

A. That question is not quite clear.

Mr. Breakstone: Will you repeat it.

(Question read.)

A. Not that I know of.

Plaintiff rested its case in chief.

Defendant moved to dismiss complaint for want of equity but withdrew the same after the court stated that motion was to be entertained only upon the idea that defendant would present no evidence after the ruling.

And thereupon defendant, to maintain the issues on its behalf, introduced the following evidence, to wit:

Howard Blum, called as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Breakstone:

I live at 546 Cornelia, Chicago, and am president and director of defendant. I have never seen or heard of contract set forth as Plaintiff's Exhibit 3 until we were served with notice of the applications for injunction, and have no knowledge whatsoever that this contract had ever been entered into. It purports to bear the signature of Samuel J. Greenspahn, secretary and treasurer. Defendant, to my knowledge, never bought any Seagram's products of the nature described in the complaint, from plaintiff; but bought the same from the following distributors and jobbers: Pioneer Wine Distillers, Old Gold Distributing Company, Roxy Liquor Company. Pioneer and Old Gold are [fol. 20-59] distributors pursuant to contract and nomination by plaintiff, but Roxy Liquor Corporation is not. I

am not familiar with the stipulated minimum prices fixed by the plaintiff for the sale of its products or as to the sale of Seagram's products in the stores of defendant. The products which were sold in defendant's stores, as described in the complaint and in court, were not purchased from plaintiff directly, but from one of the three companies just named.

Q. Now, were the sale prices that you sold the merchandise in question at in excess of the cost prices to you of this merchandise?

Mr. Richard Mayer: I object.

A. Very largely.

Mr. Richard Mayer: I object to any such generalization. If we are going to get down to details, let us find out what happened in each instance.

Mr. Breakstone: All right. Mark these Defendant's Exhibits 11, 12, 13, and 14; mark this check Defendant's Exhibit 15, and the remaining documents Defendant's Exhibits 16, 17, 18 and 19; mark this check Defendant's Exhibit 20, and the remaining documents Defendant's Exhibits 21 to 26.

(Documents marked as requested.)

Q. Mr. Blum, I show you Defendant's Exhibits marked 12 to 14, inclusive, for examination.

A. Yes, sir.

Q. Do you recall the purchases of liquor by your corporation from the billings contained thereon?

A. Yes, sir.

Mr. Richard Mayer: I object to that, as being leading and suggestive. What this man has personal knowledge of, all right.

The Court: Read the question.

(Record read.)

[fol. 20-60] The Court: The answer may stand.

Mr. Breakstone:

Q. Did you purchase these liquors at the prices indicated thereon?

Mr. Richard Mayer: I object, until it is first shown that this man personally had these transactions, or if one of these other gentlemen connected with them had. If he had personal knowledge, it is not shown.

The Court: You can cross-examine on that.

Mr. Mayer: All right. I am making my objection, if the court please.

Mr. Breakstone:

Q. I show you Defendant's Exhibit 11. Is that your name on that check?

A. Yes, sir.

Q. I show you Exhibits 15 to 19, inclusive, for inspection.

A. Yes, sir.

Q. State whether or not your corporation made the purchases of liquors contained on the billheads contained on these exhibits?

A. We did.

Q. Did you pay for them by this check?

A. Yes, sir.

Q. Exhibit 15?

A. Yes, sir.

The Court: Let me see the billhead.

Mr. Breakstone:

Q. I show you Exhibits marked 20 to 26, inclusive, for inspection.

A. Yes, sir.

Q. State whether or not you purchased the liquors in question from the corporation Pioneer Wine Dealers, Inc. appearing on said exhibits?

Mr. Richard Mayer: The same objection.

A. Yes, we did.

The Court: Wait a minute. Do not answer when there is an objection.

The Witness: I see.

The Court: Will you read the question?

(Question read.)

[fol. 20-61] The Court: Objection is overruled.

Mr. Breakstone: What is the answer?

A. Yes, sir.

Q. Were these items of Seagram liquors appearing on these statements purchased from these respective corporations at the prices indicated on these statements?

A. No, sir. They were purchased for less.

Mr. Isaac Mayer: What is that?

(Answer read.)

Mr. Richard Mayer: Just a moment. What is that last question?

(Question and answer read.)

Mr. Richard Mayer: Are you offering these, counsel?

Mr. Breakstone: I have not offered them yet. I intend to. I want to present them to one more witness.

Q. Now, Mr. Blum, tell me, did your corporation sell any Seagram's merchandise at any time below cost of the merchandise to your corporation?

A. Never.

Q. And was this contract, Plaintiff's Exhibit 3, at any time ever presented for consideration to the board of directors of the Old Dearborn Distributing Company?

A. No, sir.

Cross-examination.

By Mr. Richard Mayer:

I had charge of the financial end of the business; and Mr. Samuel J. Greenspahn, one of the officers of the company, had charge of the buying. He was the purchaser and had full charge of the purchases of the company. He consulted with us, but it was his duties. I do not know offhand whether there were occasions when Mr. Greenspahn's [fol. 20-62] signature was the sole signature on documents signed on behalf of the company, other than the particular contract involved here. I do not know of any transaction conducted by defendant in any name other than that of Old Dearborn Distributing Company.

Q. Did your company ever operate under any trade name names, or names other than that?

A. Yes; we had our stores;—that is, we had the name on our store of Old Dearborn Liquor Stores, for the purpose of retail sales. We could not very well call each in-

dividual retail store Old Dearborn Distributing Company, but we did call the unit Old Dearborn Liquor Stores, as a retail trade name.

Q. In what way did you use that name?

A. We put it on the window for the purpose of a retail liquor outlet for our company.

Q. Was that the only place you ever put it?

A. To my knowledge, yes.

Q. Well, now, just think a little and help us out here.

A. Help me out. I can't think of any.

Q. What do you have to do in order to get a license to operate a retail liquor store?

A. Well, we have to get a license.

Q. But what information do you have to go to the State of Illinois——

A. The name.

Q. (Continuing.) —and to the City of Chicago?

A. The name of the corporation applying for the license, and the name which will appear on the windows of the store.

Q. Is that what the thing says, as you recall it, the application?

A. As I recall, that is what the application says.

Q. You recall that the application says trade name of business?

A. The name of the store upon which it operates under.

[fol. 20-63] Q. Well, just look that over.

The Court: Never mind.

Mr. Richard Mayer: All right.

The Court: I do not care about that.

Mr. Richard Mayer:

Q. Do you recall that you executed an application for a renewal license for the store at 209 South Wabash avenue, in which you answered the question, "Trade name of business" as "Old Dearborn Liquor Stores"?

A. I filled in the printed form.

Q. If you signed that application it is correct, is it not?

A. I filled in the printed form. We do not lie to the State, or City, or Government, on licenses. It must be correct.

Q. Did you use the trade name?

A. The trade name of the issuing corporation is on there, Old Dearborn Distributing Company is the corporation applying for the license.

Q. Mr. Blum, if you used the trade name Old Dearborn Liquor Stores for the purpose of getting a license that means what it says, is that right?

A. We had to put that name because we could not get a license for the stores if we had Old Dearborn Distributing Company on the window. We had Old Dearborn Liquor Stores as a retail outlet, and we had to put the name of the store on the application; that is what this space is in there for.

Mr. Richard Mayer: That is what I thought.

Q. In other words, you operated that particular store at 209 South Wabash avenue,—that is, when I say "you" I mean the company, the distributing company—under the name of the Old Dearborn Liquor Stores, is that right?

A. All of our leases were signed, "Old Dearborn Distributing Company." We operated as the Old Dearborn [fol. 20-64] Distributing Company. The name on the window was Old Dearborn Liquor Stores, a retail outlet.

Q. Selling under that name as a retail outlet?

A. That may be your impression. My impression is, you asked me what we operate under. We operate under Old Dearborn Distributing Company.

The Court: Those things will be proved by something more than a person who is not familiar with the law.

Mr. Richard Mayer: All right.

Q. Now, you have had occasion to see cards around your different stores, have you not?

A. I have not been to the outside stores for months.

Q. What do you call the "outside" stores?

A. Well, I mean the outlying stores, outside of the main store.

Q. What are the main stores?

A. 209 Wabash and Lincoln avenue.

Q. No, no.

A. The main stores, 208——

Q. What is the main store?

A. 208 Madison.

Q. You have been there daily for the past months?

A. Where?
Q. At 208 West Madison?
A. Yes, I have been there.
Q. Have you been over at South Wabash avenue during that time?

The Court: Ask him if he knows whether those cards were in his store for use.

Mr. Richard Mayer:

Q. Was Plaintiff's Exhibit 13 or any cards similar to it ever in your store at 208 West Madison street?
A. I think they were.

The Court: That is the end of that. Go to something else.

Mr. Richard Mayer.

[fol. 20-65] Q. And was a card such as Plaintiff's Exhibit 7 on display or for use in your north side store?

The Court: Is that a different one?
Mr. Richard Mayer: That is the same.

A. Well, I imagine it was; it was there. I have not been in that store for months.

Mr. Richard Mayer: All right.

Q. Is the same true with reference to the cards previously marked Plaintiff's Exhibit 2, so far as 209 is concerned?
A. Yes, that is right.
Q. That is right?
A. Yes.

The Court: May I see that card again? May I see one of those cards?
Mr. Richard Mayer: That is the north side; this is Madison. They are the same identical thing.
The Court: All a matter of names.
Mr. Richard Mayer: That is right. Just a moment.

Q. I have here Plaintiff's Exhibit 14. It looks like this was a receipt that came out of 208 West Madison.
A. That is right.
Q. Do you identify it as such?
A. Yes, that is right.

Q. And this plaintiff's exhibit, at the top there, shows, "Old Dearborn Distributing Company"?

A. That is right.

Q. "Co."?

A. Right.

Q. Plaintiff's Exhibit 18, you identify that as a receipt that comes from 209 South Wabash avenue, do you not?

A. Well, this is 209 or 3202 Lincoln.

Q. Either the north side store or 209?

A. I have no way of telling.

Q. What is the name you use up there?

A. Old Dearborn Liquor Stores.

Mr. Richard Mayer: Thank you.

[fol. 20-66] Q. And Plaintiff's Exhibit 17, that is one of your receipts?

A. Yes, sir.

Q. Where does that come from?

A. Either of the two stores.

Q. Either Wabash avenue or out of the north side store?

A. That is right.

Q. How about Plaintiff's Exhibit 9?

A. That came out of 208 West Madison.

Q. Just look at that signature and tell me if you recognize that signature.

A. That looks like Mr. Brown's. He is a left-handed writer.

Q. What is his first name?

A. Harry Brown.

Q. It looks like he signed that receipt for this boy Lloyd that we talked about this morning?

A. It looks like his signature.

Q. Can you recognize the signature on Plaintiff's Exhibit 10?

A. No, sir. I cannot.

Q. Where was that received?

A. At either one of the two stores; must be some clerk.

Mr. Richard Mayer: All right. Thank you. Can we have just one moment?

The Court: Yes.

Mr. Richard Mayer:

Q. Mr. Blum?

A. Yes, sir.

Q. You saw the original answer that was filed to this suit, prepared by Mr. Breakstone?

A. Yes, sir.

Q. You signed it?

A. I signed it, yes, sir.

Q. Did you read it over before you signed it?

A. I read it.

Q. Did you read it all the way through before you signed it?

A. I read it all the way through, yes, sir.

Mr. Richard Mayer: That is all.

Mr. Breakstone: One question, Mr. Blum.

[fol. 20-67] Redirect examination.

By Mr. Breakstone:

Q. Was Mr. Greenspahn authorized by authority of the the corporation to take out—make licenses for liquor licenses for these stores?

A. Yes, sir, he was.

Mr. Richard Mayer: I object to that.

Mr. Isaac Mayer: It calls for a conclusion.

The Court: Objection sustained. That is provable, if it is material, by the minutes, upon objection.

Mr. Breakstone: That is all.

Mr. Richard Mayer: That is all.

Mr. Breakstone: That is all, Mr. Blum.

(Witness excused.)

Mr. Breakstone: Mark this Defendant's Exhibit 27.

(Document marked as requested and offered and received in evidence.)

Mr. Breakstone: We have Exhibit 27, which is the charter of the corporation.

SAMUEL J. GREENSPAHN, called as a witness on behalf of the defendant, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Breakstone:

Q. Mr. Greenspahn, you are secretary-treasurer of the defendant corporation here?

A. That is right.

Q. You heard this witness McCray testify here a moment ago?

A. Yes, sir, I did.

Q. Did he ever hand you a copy of this price list, minimum price list or letter similar in form as that attached to the complaint here?

A. He did not.

[fol. 20-68] Q. Did you ever receive either of those documents through the mail or otherwise?

A. No, sir.

Q. Have you even seen a copy of the same until the complaint in question was served upon you?

A. No, sir.

Q. Now, referring to these exhibits of the defendant, showing you first, Exhibits 11 to 14, inclusive, which relate to the transactions between the defendant corporation and Pioneer Wine Dealers, Inc., will you examine those documents and point out the items of Seagram's products purchased from those corporations and similar to those described in the complaint?

Mr. Richard Mayer: I object to characterizing any documents by pointing out.

The Court: Read the question.

Mr. Richard Mayer: They will speak for themselves.

The Court: Will you read the question?

(Question read.)

The Court: Proceed.

Defendant is engaged in the wholesale business, selling liquor and products of similar description to those mentioned in the complaint.

The witness then identifies document marked Defendant's Exhibit 28 as the corporate minutes of defendant kept by the witness as secretary-treasurer.

Mr. Breakstone (to opposing counsel): I wonder if we could agree to put in evidence certain sections of these by-laws without reading it all into the record?

Mr. Richard Mayer: There is an objection to that that it is immaterial, irrelevant and incompetent.

The Court: They might be received subject to the objection.

[fol. 20-69] Mr. Breakstone: I want to refer specifically in that Exhibit 28 to certain sections.

The Court: I am making my ruling with the idea that you want to introduce some small part of it.

Mr. Breakstone: That is right, a small part of it. But I will introduce all the by-laws if the objection is on the contention that I am introducing a part rather than the whole.

Mr. Richard Mayer: We object to it as immaterial, irrelevant and incompetent, the whole or any part of the by-laws of this company.

The Court: As to the the business it is in?

Mr. Richard Mayer: Yes.

The Court: Whether it is wholesaler, and distributor, or sells as a retailer—I think it is competent to prove by some part of it that——

Mr. Richard Mayer: I don't understand if counsel offers it for that purpose.

The Court: It contains a copy of the charter, does it?

Mr. Breakstone: Yes, your Honor. We have the charter, but we have not offered the charter; we have had that charter identified.

The Court: Then it is not necessary on that point if you have the complete charter here.

Mr. Breakstone: One of the defenses raised by the answer is that the contract in question was executed without authority, and I want to put in sections of the by-laws, or seek to put in sections of the by-laws that set forth the powers and rights of the board of directors, and the powers given to and residing in the president, and the powers given to and residing in the secretary-treasurer, who really executed the contract.

The Court: You deny that he acted for your company.
[fol. 20-70] Mr. Breakstone: There is the question of lack of authority.

The Court: It may go in subject to the objection. In any event counsel could make the offer.

Mr. Breakstone: That will straighten it up.

I want to offer that part of Exhibit 28, setting forth in the by-laws Section 5, relating to the powers of the board of directors, Section 6 relating to the powers of the president of the corporation, Sections 8 and 9 relating to the powers of the secretary-treasurer of the corporation.

Mr. Isaac Mayer: That is objected to.

Mr. Richard Mayer: And to all and each of them.

Mr. Breakstone: And the additional power covering the minutes of the corporation, which is about five pages.

Mr. Richard Mayer: We object to that also as immaterial, irrelevant and incompetent.

The Court: I don't know what you are trying to do. Are you making the offer, to be followed by stating everything that you expect to put in? If you want to proceed under the rule of court and offer those provisions subject to the objections, you may do so.

Mr. Breakstone: Then I will offer them subject to the objections, and subject to whatever your Honor's ruling may be.

Portions of by-laws offered and received in evidence as Defendant's Exhibit "28".

Cross-examination.

By Mr. Richard Mayer:

The Witness: Defendant sells alcoholic beverages to the store located at 65 East Van Buren street, which store belongs to Howard Blum, and not defendant.
[fol. 20-71] Howard Blum is president of the defendant, and that store is also partly owned by Mr. A. N. Liebling.

Whereupon Defendant's Exhibit 1 to 28, inclusive, were received in evidence, said Exhibits 1 to 26 inclusive consisting of invoices of merchandise purchased by defendant and checks issued by defendant in payment of certain of said invoices; said Exhibit 27 being a copy of defendant's Arti-

cles of Incorporation, and said Exhibit 28 being in the following words and figures, to wit:

DEFENDANT'S EXHIBIT 28

By-Laws of Old Dearborn Distributing Company

Article II

Board of Directors

Section 5. Powers.—In addition to, and not in limitation or prejudice of, the general powers conferred upon it by the laws of the State of Illinois, by the Certificate and Articles of Incorporation, and by the By-Laws, it is hereby expressly declared that the Board of Directors shall have the following powers:

(a) To manage the business and affairs of the corporation and fix the terms, conditions, and consideration on which all, or substantially all of the assets and property of the Corporation may be sold, leased, exchanged, mortgaged, pledged, or otherwise disposed of, in the usual and regular course of the business of the Corporation;

(b) To purchase, or otherwise acquire for the Corporation, any property rights, or privileges which the Corporation is authorized to acquire, at such price or consideration and generally on such terms and conditions as it thinks fit, and at its discretion to pay therefor either wholly or partly in money, stock, bonds, debentures or other securities of the Corporation;

(c) To create, make and issue mortgages, bonds, deeds [fol. 20-72] of trust, trust agreements, and negotiable or transferable instruments and securities, secured by mortgage or otherwise, and to do every other act and thing necessary to effectuate the same;

(d) To appoint any person or corporation to accept and hold in trust for the Corporation any property belonging to the Corporation, or in which it is interested, or for any other purpose, and to authorize such person or corporation to execute such deeds and do all things requisite in relation to any such trust;

(e) To designate two or more Directors to constitute an Executive Committee and to delegate any of the powers of the Board of Directors in the course of the current business of the Corporation, not specially restricted to it by Statute, to said Committee or any standing or special Committee, or to any officer or agent, and to appoint any persons the agents of the Corporation, with such powers (including the right to subdelegate) and upon such terms as it sees fit;

(f) To designate places for the meetings of the Board within or without the State of Illinois;

(g) To appoint, and at its discretion, remove or suspend permanently or temporarily such subordinate officers, agents or servants as it deems fit, and to determine their duties, from time to time change their salaries or emoluments, and to require security in such amounts as it thinks fit;

(h) To confer by resolution upon any appointed officer of the Corporation the power to appoint, remove or suspend any subordinate officers, agents or servants;

(i) To designate who shall be authorized to sign bills, notes, receipts, acceptances, endorsements, checks, releases, deeds, contracts, and other instruments on the Corporation's behalf;

(j) To fix the salaries of all officers of the Corporation;

(k) To change from time to time by appropriate resolution, the registered office or registered agent of the Corporation, or both;

(l) To fix the consideration for which the shares of the Corporation may be issued from time to time, unless the [fol. 20-73] Articles of Incorporation reserve to the Shareholders such right;

(m) To issue calls for payment on subscriptions in such manner and at such times as it may determine; to prescribe penalties for failure to pay calls, or installments thereon subject at all times to the provisions of the law of the State of Illinois;

(n) To determine the part of the consideration received for the shares of the Corporation which shall be allocated to stated capital;

(o) To authorize the issuance of scrip or other evidence of ownership for fractional shares of the Corporation and fix the rights of the holders thereof.

Article III

Officers

Section 6. President.—The President shall preside at all meetings of Shareholders. Subject to the Board of Directors, he shall have general charge of the business of the Corporation, and shall perform all the duties usually incident to the office of President. He shall perform and carry into effect all orders and resolutions of the Board of Directors, subject, however, to the rights of the Directors to delegate any specific power, except such as may be by Statute exclusively conferred on the President, to any other officer or officers of the Corporation. He shall have the power to sign and execute all authorized bonds, mortgages, contracts, agreements or other obligations in the name of the Corporation and with the Secretary or an Assistant Secretary may sign all Certificates of the shares of the capital stock of the Corporation. Unless and until otherwise ordered by the Board of Directors, the President of the Corporation shall have full power and authority, on behalf of the Corporation, to receive and accept, and to waive, notice of the time, place and/or objects of any and all meetings of Shareholders of any corporation wherein this corporation shall be a shareholder, and, for and in the name and behalf of this Corporation, (a) to attend and vote at such meetings, or (b) by instrument of proxy to appoint a [fol. 20-74] proxy or proxies to attend and vote at such meetings on behalf of this Corporation.

Section 8. Treasurer.—The Treasurer, subject to the supervision and direction of the Board of Directors, shall have custody of all funds and securities of the Corporation which may come into his hands; when necessary or proper he shall endorse (or cause to be endorsed) on behalf of the Corporation for collection, checks, notes, and other obligations and shall promptly deposit the same and all monies and available effects to the credit of and in the name of the Corporation, in such bank or banks or depositaries, as the Board of Directors may designate, or in its failure to so

designate, then in such bank or banks or depositaries, as may be designated by the President. The Treasurer shall render a statement of accounts of the Corporation whenever required by the Board of Directors; he shall enter regularly in the books of the Corporation, to be kept by him for that purpose, a full and accurate account of all the monies received and paid by him on account of the Corporation; he shall at all reasonable times exhibit his books and accounts to any Director of the Corporation upon application at the office of the Corporation during business hours; he shall perform all acts incident to the position of Treasurer, subject to the control of the Board of Directors. If so required by the Board of Directors, he shall give a bond for the faithful discharge of his duties in such amount as the Board of Directors may specify. In the event of the death, disability, resignation or removal from office of the Treasurer, all books, papers, vouchers, money and property of whatever kind in his possession belonging to the Corporation shall be surrendered to the Corporation.

Section 9. Secretary.—The Secretary shall record all votes and the Minutes of all meetings of the Shareholders, and of all meetings of the Board of Directors, and also (unless otherwise directed) of all meetings of Committees in books provided for that purpose. He shall sign all Certificates of Stock with the President or a Vice-President. He shall, with the President or Vice-President, execute all authorized contr cts, agreements, bonds or other evidences of [fol. 20-75] indebtedness, and when so ordered by the Board of Directors of the Corporation, he shall affix the Corporate Seal thereto, and to all other documents requiring a Seal. He shall have charge of the certificate books, stock ledgers, and such other books and papers as the Board of Directors may direct, all of which shall, at all reasonable times, be open to the examination of any Director upon application at the principal office of the Corporation, during business hours. He shall attend to the giving and serving of all Notices, and he shall in general perform all the duties incident to the office of Secretary, subject to the control of the Board of Directors. He shall submit such reports to the Board of Directors as may be requested by it. In the event of the death, disability, resignation or removal from office of the Secretary, all books,

papers, vouchers, money and property of whatsoever kind in his possession, control or custody, belonging to the Corporation, shall be surrendered to the corporation.

Mr. Richard Mayer: Let me see them. I cannot intelligently address the court without seeing them.

Mr. Breakstone: I will produce them for you, here are 1 to 10, which are the invoices.

Mr. Richard Mayer: Let me see the rest of them.

Mr. Breakstone: I thought you would go through them one at a time.

Mr. Richard Mayer: I have seen those (indicating).

Mr. Breakstone: Here are 11, 12, 13, 14, 15 to 19, 20 to 26, 27 and 28.

Mr. Richard Mayer: They are each objected to, separately, on the ground that they are immaterial, irrelevant and incompetent, with the exception of the corporate charter marked 27.

The Court: Let me see that charter, please.

[fol. 20-76] Fred A. Melick, called as a witness, in rebuttal, on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Richard Mayer:

I live at 9912 South Peoria street, Chicago, and am a salesman for plaintiff. On November 16, I went over to defendant's store at 208 West Madison street, Chicago, with Mr. McCray; and I and Mr. McCray had a conversation with Mr. Samuel J. Greenspahn. I asked Mr. Greenspahn if he had received copies of Plaintiff's Exhibits 19 and 20, being a letter of plaintiff and a price list, and he stated that he had received them; and at the time of our conversation I handed Mr. Greenspahn another copy of that letter and price list. I have been a salesman for plaintiff since before August 1935, and the price list shown on Plaintiff's Exhibit 20 has remained the same since August 26, 1935, up to the present time.

Cross-examination.

By Mr. Breakstone:

Q. Did I understand you to say, Mr. Melick, that in the course of the conversation with Mr. Greenspahn he stated that he had not received the copy of minimum price list and the accompanying letter which was just shown you?

A. I stated that he received it.

Q. He stated that he had received it?

A. Yes, sir.

Q. Then I didn't understand you. O. K.

A. Yes, sir.

Mr. Breakstone: That is all.

(Whereupon Plaintiff's Exhibits 19, 20 and 21, respectively, were received in evidence. Plaintiff's Exhibit 19, [fol. 20-77] being the same as Exhibit 3 to the complaint, set forth in full at page 12, supra; Plaintiff's Exhibit 20, being the same as Exhibit 4 to the complaint set forth in full at page 15 supra, and said Plaintiff's Exhibit 21, being a Fair Trade contract dated October 23, 1935, between plaintiff and Roxy Liquor Corporation, and on a form identical with Exhibit 2 to the complaint set forth in full at page 9, supra.

STIPULATION AS TO CERTAIN FACTS

Counsel for both parties stipulated that the only stockholders' or directors' meetings shown in defendant's Exhibit 28, being the corporate minutes of defendant, were held on the following dates:

(1) January 5, 1934, the first stockholders' meeting was held.

(2) July 10, 1934.

(3) November 12, 1935.

Said meetings were joint meetings of both stockholders and directors.

It is further stipulated by counsel that defendant has continuously engaged in business including the retail sale of liquor since the date of its incorporation and that its place of business is and has been at one or more of the places named in the testimony given in this cause.

Whereupon Plaintiff's Exhibits 22 and 23, respectively, were received in evidence. Said Exhibit 22, being a Fair Trade Contract dated October 29, 1935, between plaintiff and Old Dearborn Liquor Stores, Inc., on a form identical with that attached to the complaint as Exhibit 2 thereto, and set forth in full at page 9, supra; and said Plaintiff's Exhibit 23 being a Fair Trade contract dated October 29, 1935, between plaintiff and Pioneer Wine Dealers on a form identical with that attached to the complaint as Ex-[fol. 20-78] hibit 2 thereto, and set forth in full at page 9, supra.

Plaintiff rested its case.

Mr. Richard Mayer made his opening argument to the court.

Mr. Breakstone, of counsel for defendant made his reply argument.

Mr. Isaac Mayer: I presume counsel will concede that the defendant has been advertising these cut prices since this case has been pending here, and if you will please show me that advertisement, I will offer it in evidence and let it be marked as an exhibit.

Mr. Breakstone: We admit that.

Mr. Isaac Mayer: I also offer in evidence a photostat of the window front at 208 West Madison street, Chicago.

Mr. Breakstone: I admit that. That will be your exhibits 24 and 25.

(Said documents, so marked as Plaintiff's exhibits 24 and 25, were thereupon received in evidence. Said Exhibit 24, being a photograph of the front of defendant's store located at 208 West Madison Street, Chicago, Illinois, showing defendant's advertisements of Seagram's products at prices less than those stipulated by plaintiff; and said

Exhibit 25 being an advertisement published by defendant in the November 25, 1935 issue of the Herald & Examiner and which is in words and figures as follows:

PLAINTIFF'S EXHIBIT 25

(Here follows one photo, side folio 20-78½)

Headquarters for Thanksgiving Liquors

OLD DEARBORN LIQUOR STORES *Protects* CHICAGO'S POCKETBOOK!

Reprint from Chicago American, November 21.

OPEN SEAGRAM PRICE CUT SUIT

Judge Rush of Circuit Court today started hearing the injunction petition of the Seagram-Distillers Corporation against the Old Dearborn Distributing Corp., which it charges with cutting prices in violation of the Illinois fair trade acts. The Old Dearborn concern operates stores at 208 W. Madison st., 209 S. Wabash av. and 3202 Lincoln av. Seagram's charge Old Dearborn advertised its brands of liquors from a few to 90 cents below established minimum prices

PAY NO MORE FOR GENUINE

Bottled in Bond

Seagram's

None to Dealers Sold

$1.99 PT. Regular $2.47

V. O. 6 YEAR OLD WHISKEY

"Old Dearborn" is determined to give their thousands of valued customers CHICAGO'S LOWEST PRICES on every brand of whiskey. We believe that price fixing is un-American and unnecessary, and decline to accept any standard of prices other than our own.

"Old Dearborn" CANNOT agree to price fixing—to a raiding of the public's pocketbook! At $1.99 pt. we enjoy a fair profit on Seagram's, and you SAVE real money.

COME TO THE "OLD DEARBORN" STORE NEAREST YOU, OR PHONE FOR FREE DELIVERY.

BUY SEAGRAM'S V. O. FOR THANKSGIVING AT "OLD DEARBORN," at $1.99 pt. Pay No More!

Regular $4.79 **Qt. only $3.93**

FREE DELIVERY
2 bottles or more.
Right reserved to limit quantities.

Cut Prices on Famous Brands

OLD DEARBORN
16 months old, 100 proof Straight Kentucky Bourbon.

97c pint · 50c ½ pint · $1.89 quart

Hiram Walker's Bourbon
Famous brand 7-yr. old, bottled in bond, pt., ... $1.69

TAYLOR WINES
Aristocrat of all wines, sweet and dry, fifth, ... 97c
$1.45 qt. decanter

Chicago's Lowest Prices
Hillcrest Gin, 90 proof, London Dry Distilled by Hillcrest Distilling Co., a subsidiary of Seagrams.

58c pint · 35c ½ pint · 87c fifth

Teacher's Highland Cream
Imported Scotch Whiskey, fifth.... $2.89

Special "Old Reserve"
16-yr. old Bourbon, bottled in bond, pt., ... $2.49

Old Dearborn LIQUOR STORES

DIVISION OF OLD DEARBORN DISTRIBUTING CO., INC.

208 W. Madison St.	209 S. Wabash Av.	65 E. Van Buren St.	3202 Lincoln Av.	1696 W. Belmont Av.
Dearborn 1770	*Web. 1477*	*Web. 2646*	*Buckingham 1770*	*Buckingham 1770*

Phone Your Nearest "OLD DEARBORN" Store for Free Delivery for Thanksgiving

[fol. 20-79] COLLOQUY

Mr. Isaac Mayer: There are a couple of witnesses who will testify to these facts, that should be added to the testimony here, that persons handling a Seagram product, and particularly with respect to those which the defendant has been cutting prices on, have notified the plaintiff that they will withdraw their merchandise from sale, and not try to push them; asserting that they cannot compete with those prices, and that unless the plaintiff does something for them they will have to discontinue handling those goods.

Do you concede that?

Mr. Breakstone: We will concede that those witnesses, if called, will swear to that, will so testify.

Mr. Isaac Mayer: They are in court now, and are ready to testify.

Mr. Breakstone: I concede that they so testify.

Mr. Isaac Mayer: There were five examples——

Mr. Richard Mayer: There were seven.

Mr. Breakstone: That is agreed.

I will now proceed with my argument.

ARGUMENT OF COUNSEL

Mr. Isaac Mayer: * * * (Continuing argument): In this case, the attitude of the defendant, your Honor, is such as to show a violent disregard of what we believe to be our rights, and the plaintiffs do not see how they can be protected unless your Honor will enter an immediate injunction. We have prepared a short decree to that effect.

The Court: Assuming that the statute is all right, and the contract is all right, which I really believe are all right, but if there is anything doubtful about them, another court ought properly to pass upon it—I think you are right in the idea that you have a right to relief, but the relief in [fol. 20-80] my opinion must be at common law. There will be no difficulty in proving the amount sold to the defendant. For those amounts he has to pay the retailer price, if not the $50, for each time he made a sale. The recovery will naturally and necessarily be the difference between the price that the products should sell for and what he did sell it for.

There is this difficulty about specific performance which you are seeking. It would, in my opinion, be converting a

proper lawsuit for proper damages into something like criminal punishment for every time he violates the contract. For instance, he violates after an injunction is granted, and the Court punishes him for contempt. Nothing like that seems to be contemplated by the contract.

Specific performance is one of the most extraordinary remedies known to the law. It is not a remedy of right, it is a remedy in the discretion of the Court, and while I am much impressed by the argument of counsel both along the matter of price fixing, the authority of the state thereon, and the matter of harm to his business, to the business which he advocates as having these rights, I am fairly convinced that he will obtain his remedy very substantially by his recovery at common law. If the new practice act gives me that power—I hardly think it does where the suit is one based upon the remedy and has no other equity features for its jurisdiction—perhaps I have to turn him over to the law side of the Court. But I say, I think he has a remedy, and a good remedy. He can trace the sales, he knows how much they are, the prices have to be paid, the resale prices, and I think it will be rather effectual and complete as a remedy.

Mr. Richard Mayer: May I make this suggestion, if the [fol. 20-81] Court please. We are here balancing equities before the equity side of the Court in a matter which as we get hardened to the problems of the law we sometimes overlook the situation as it is presented to the business interests involved on both sides. There is no attempt to restrain the defendant from selling his property at any price he feels he desires to do so, excepting when he cuts, and in addition to that property, is using our name. We are not concerned with an attempt on the part of the defendant to sell Seagram's V-O without Seagram's label on a bottle. We are not trying to stop him even from selling——

The Court: We aren't reviewing the case. Counsel has argued that very carefully.

Mr. Richard Mayer: May I suggest, your Honor, forget the availability here in an Equity Court of requiring from the complainant in this case the giving of any bond that will be protective to the defendant; but how can the Court, from the showing in this case, leave the plaintiff in a position where the defendant may be unable to answer in dam-

ages to the complainant. Requirements can be insisted upon, as far as the complainant is concerned, that will be protective of the defendant, if the Court please.

The Court: Counsel, I have no doubt that you are very sincere in seeking this remedy, because it is tremendously effective. You know it would be; but to apply it in a case of this kind when much discretion is used by the Chancery Court seems really ridiculous, that remedy. That's not the word I would like to use. It lessens the dignity, and you might say the unusual character of this remedy, to use it [fol. 20-82] in a case where the only damage is selling for less.

Mr. Richard Mayer: Will the Court indulge me a few moments' time on one particular confined phase of this case?

The Court: Yes.

Mr. Richard Mayer: I recognize your Honor's zealous concern about restricting the use of the injunction relief that is available in a Court of Equity, but I also realize, if the Court please——

The Court: You realize this—that from a mere breach of contract that does harm you, and therefore justifies recovery and damages, you would turn this into a criminal act, because the Court would punish him by a contempt fine and stick him in jail for breaking this contract.

Mr. Richard Mayer: Now, if the Court please, we are met in the discussion of a problem that has not had the attention of our highest court. We are all of us hopeful of a decision at an early date, but now let me point out to the Court the situation that will result in the interim between now and two or three or four months from now when the decision is finally passed upon above—that the demoralization and the disorganization of the entire attempt to properly sell our products in this community will result for this reason—we can't sell a pint bottle of 5-Crown whiskey, our distributor, one of the twelve, can't sell a 5-Crown pint for a dollar and one cent per pint to a retailer, although there are general agreements throughout this community to that effect to-day, if one or more, particularly in an instance where a person has agreed not to do so, can between now and the time of a final decision in a reviewing court, dispose of to the consuming public [fol. 20-83] for 99¢, or less than the retailer is purchasing,

so that for the period of delay until a final decision by the Supreme Court——

The Court: Well, you will have a decision now that ought to be some aid against these practices from me. I would use my office if I could to give you a speedy jury trial in a law court, and I would say that if I was trying the case and this proof was as it is here, I would instruct the jury—of course, the validity of the statute and the contract being assumed.

Mr. Richard Mayer: We have a prayer in our bill for such other relief as to the Court shall seem just in this particular complaint, and we are in a court of equity.

The Court: I would give it to you if it wouldn't involve—you see, it must have a jury.

Mr. Isaac Mayer: How would we measure the damages, your Honor?

Mr. Breakstone: I can answer that.

The Court: The quantity—for instance, every case sold; you know what it should resell for.

Mr. Richard Mayer: The Court said as to the damage a few moments ago, and I pointed out to the Court this morning that, in addition to other violations of the agreement, that the effect of the advertisement in yesterday morning's Herald & Examiner——

The Court: Which was very impudent, and if I could do anything about it I would.

Mr. Richard Mayer: Let us forget the impudency of the particular advertisement and see the effect upon plaintiff's business, and see if the Court and ourselves can estimate how to control and portect against it.

[fol. 20-84] The Court: It is partly for that reason that I give you my decision to-day instead of taking it under advisement and having you miss maybe the Christmas cheer of people in general.

Mr. Richard Mayer: The only point of difference between the Court and ourselves at the moment seems to be the method that a Court of Equity——

The Court: The specific performance of this contract is accomplished by an injunction, and that is the way negative covenants are specifically performed, and that part you know I feel of confidence you are not entitled to.

Mr. Isaac Mayer: May I make a suggestion, your Honor? I do it reluctantly because I know your Honor has given

careful consideration to this. Perhaps we didn't sufficiently emphasize it, and I think we can do so if the Court would give us an opportunity to show to you that the relief to be granted against unfair competition is always by injunction, and if your Honor will let this go over so we can show you these authorities——

The Court: I know there are many authorities both ways.

Mr. Richard Mayer: I don't think there are any the other way on that particular point, if the Court please.

The Court: I am going as far as I will on a contract of this kind, and I think you are not without considerable aid in what I consider a fair contract, as settled by statute, but I wouldn't like to be subjected to the barrage of the different decisions about specific performance cases.

Mr. Isaac Mayer: That is just what I would like to ask. [fol. 20-85] The Court: I know you can present many on one side and many on the other.

Mr. Isaac Mayer: The statute itself really answers that. It says, "Such party is guilty of unfair competition, and is actionable at law."

Mr. Breakstone: Well, the Court gives you the remedy at law.

The Court: In that specific thing, they can't tell us what remedy we shall apply, and I don't think——

Mr. Isaac Mayer: Would your Honor be willing to do this—to give us an injunction upon condition that we appeal immediately, because when you come to measure the harm done we give a bond, of course, in appropriate penalty.

The Court: Appeal immediately. You have the advantage of an open hearing.

Mr. Breakstone: I will aid and assist them to get their appeal up there immediately.

The Court: But you have got the advantage of a decision on that.

Mr. Isaac Mayer: The only trouble is that we haven't got the relief.

Mr. Breakstone: All you have to do is stop those distributors from selling their merchandise to these people.

Mr. Richard Mayer: Will the defendant desist?

The Court: Well, he ought to.

Mr. Richard Mayer: Unless this Court tells him to we can't control what he does.

The Court: Well, he is going to pay the damages.

Mr. Isaac Mayer: There is no amount of damages, your Honor.

Mr. Breakstone: $50 a sale, $300 on those six sales; they would bankrupt us in no time if they insisted on their rights.

[fol. 20-86] The Court: I am thinking of the legitimate damages. The jury always gives more, you know.

Mr. Breakstone: I know that is dangerous.

The Court: They have to pay the resale price.

Mr. Isaac Mayer: Will your Honor leave it open so that we can consider whether we want to amend that bill by alleging solvency?

Mr. Breakstone: The case is closed, isn't it?

The Court: Yes, I will not give this remedy.

Mr. Isaac Mayer: I understand that, but will your Honor just let this matter remain open until to-morrow morning, so that we can conclude what step we want to take next?

The Court: I won't enter the judgment. I won't enter any decree until to-morrow.

Mr. Isaac Mayer: You might make that Friday, if you want.

The Court: All right, Friday.

(November 30, 1935.)

Mr. Richard Mayer: If the Court please, I would like to put in some additional evidence.

Mr. Breakstone: For the purpose of the record, although I know it is within the sound judicial discretion of the Court to hear additional testimony, if the Court so decides, but this is a surprise to us, that additional testimony is to go in, and we have no knowledge, and no means of knowing what testimony is to be put in.

The Court: If it develops that you should have a continuance, you will get it.

Mr. Breakstone: All right, your Honor.

[fol. 20-87] A. MARCO, called as a witness on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Richard Mayer:

I live at 5028 North Hermitage Avenue. I am in the liquor business and operate a store in Chicago, the Marco Liquor Company at 157 North Wabash Avenue. I have been operating that store since the first day of repeal, December 5, 1933. I have an investment of about $80,000 in the business I am operating there. I know the Old Dearborn Distributing Company, defendant in this case. I recall stores they operate on Madison Street, Wabash Avenue and Lincoln Avenue, they have cut prices on Seagram's merchandise below the price set by the Seagram-Distillers Company in the City of Chicago. I have dealt in Seagram's V-O, Seagram's 5 Crown blended whiskey, Seagram's 7 Crown blended whiskey, and other Seagram products. I purchased the Seagram's liquor sold at my store through Bloom and Company. During the month of November I purchased 144 cases.

Up to November 29th our purchases of Seagram's merchandise are 14 cases in comparison with 144 cases a year ago. I noticed the advertising of Old Dearborn Distributing Company on Monday, November 25, 1935, Plaintiffs' Exhibit 25. The week before this "ad" appeared we sold about four or five pints of V-O per day, since the advertisement it dropped to nothing, probably a pint a day or every other day. Prior to this advertisement we sold a little more Seagram's 5 Crown blended whiskey than V-O, probably one-half case or less. Prior to the "ad" we sold eight or ten [fol. 20-88] pints of Seagram's 7 Crown blended whiskey per day. Since the "ad" we sold two or three a day and some days less. I have four clerks working in my store. I had customers come into my store since the "ad", probably six customers referred to this "ad", on two or three days thereafter its appearance. They came in and asked us how much is your V-O a pint, and our price being $2.47 they would say, "All I have to do is walk two or three blocks south of you and buy for $1.99." We just let them walk out, we did not meet these competitive prices. I talked to six or eight customers personally.

There is an association of retail liquor package stores in Chicago; Illinois Retail Liquor Package Stores of Chicago, Inc. It consists of about 90 per cent of the exclusive liquor store dealers of this community. There are about 125 members. I am the president of this association.

Price cutting has demoralized the sale of Seagram's products in practically every decent liquor store.

(Objections of Mr. Breakstone to this testimony overruled by the Court.)

The board of this liquor package store association meets about three or four times a month, but the entire membership once a month. In these meetings discussions took place concerning the conduct of the Old Dearborn Distributing Company. It does not belong to our association. Its store at 209 South Wabash Avenue is about three blocks away from our store on the same side of the street.

We are now selling about 14 per cent of Seagram's products of what we did a year ago. It is due to price cutting.

[fol. 20-89] Cross-examination.

By Mr. Breakstone:

I rceeived a copy of the telegram, Defendants' Exhibit 29. I did not receive a copy of Defendants' Exhibit 30. I knew this suit was pending prior to receiving a copy of Defendants' Exhibit 29, the telegram. We discussed this case in our meetings, among our retail liquor dealers during the course of this trial. The meeting was held at the Sherman Hotel on Tuesday. In our association we try to do everything in our power to help stabilize prices in this market. That is part of the function of our association. Our by-laws do not provide for price fixing.

I was not subpœnæd to come here. I came as a volunteer. I first discussed the matter of the testimony I was going to give here on the stand with the plaintiff's attorney. I went to Mr. Mayer's office with Mr. McQuade. I first talked with plaintiff's attorneys yesterday. I called McQuade after I received this telegram and he made an appointment to take me to plaintiff's attorney's office. The general demand of the public for products labeled with the Seagram's label has declined in Chicago because of price cutting.

We do not push the sale of Seagram whiskeys now. We found in the face of the price cutting of the various "ads"

that had been in the newspapers that the public knows about, we make no attempt to sell it because we are so far out of line that our consumers get the impression that we are high on everything.

We first noticed a decline in the sale of Seagram's products when a certain organization put an "ad" in the paper cutting the price to 93c about a year ago. This was the [fol. 20-90] Goldblatt stores. Our sales declined progressively for the last year in the sale of Seagram's merchandise. I am not a distributor of Seagram's products; we have not signed one of these Fair Trade Agreements with the Seagram Distillers Company. I buy all merchandise from their distributor. I have not signed any retail sales contract either. I have no trouble in getting Seagram's merchandise. My reputation is such that I am not in any category of price cutters, and accordingly it was not necessary for them to ask me to sign a contract, but if they asked me I would have signed.

I can get all the Seagram's merchandise that I want from their distributors. I have no difficulty in getting their merchandise.

Redirect examination.

By Mr. Richard Mayer:

Mr. Breakstone: I am perfectly willing to stipulate that if the representative of the Monroe Wine & Liquor Company, operating a retail store at 175 West Monroe Street, Chicago, Illinois, were called as a witness, his testimony would be substantially the same as Mr. Marco's and that of the witnesses in the court room now. I make the same stipulation as to the other witnesses, that is, the Mid-West Liquor Company, 11 South Kedzie Avenue, with the same objections as to the compiling of the evidence.

Frank R. Schwengel, called as a witness on behalf of the plaintiff, testified as follows:

I am a brigadier general in the Illinois National Guard. I live at 2844 Logan Boulevard, Chicago. I am vice-president of Seagram's Distillers Corporation, the plaintiff in this [fol. 20-91] case. The executive offices of the plaintiff com-

pany are in New York City. I am vice-president and a director of the plaintiff and have been with the company since its organization in January, 1934. Prior to my connection with the plaintiff, all through life, with the exception of three years in the army service, my business experience has been in advertising and merchandising accounts, with the exception of a period of about eight months immediately following the war when I was representing a banking group. I am fifty years old.

With reference to Seagram's products handled by the plaintiff, Government taxes, that is duties, import taxes, excise taxes, internal revenue taxes, state taxes, represent, depending upon the product, from 40 per cent to 60 per cent of the total cost. Six-year old whiskey for which we get $16 at the plant, bonded whiskey, there is added to that $21.50 in taxes plus state taxes in Illinois of $1.50, a total of $23, on top of the $16 item, so that in that case it represents more than that amount; that is bonded liquor of the type of V-O. I know the Illinois legislature has enacted a Fair Trade Act.

Our company is licensed to do business in Illinois. It operates under the Fair Trade Act in the State of Illinois completely. In the course of the sales and distribution of Seagram's products in the State of Illinois and elsewhere, I have had personal experience in connection with price cutting and its effect upon the sale of the articles manufactured by the Seagrams people and in the Seagram's products. Our business since November 15th, has absolutely stopped. There is a buyers' buying strike, and cancellations of orders [fol. 20-92] in our business this month is, with one day to go, 81 per cent less than last year; and I should say about one-third of last month when it should show us in that period an increase, based again on our experience in this market of at least 200 per cent over last month. The three biggest liquor selling days in the year are Thanksgiving, Christmas and New Years. They represent the real buying season when people very actively buy liquor. In the Thanksgiving season this year outside Illinois our business shows an increase for November nationally even including the loss we have taken in the Chicago market,—the only place we show a loss,—the increase is 200 per cent greater than in October.

Our business has gone down 81 per cent in Chicago from last year and about one-third of the volume that we got during October which is usually regarded as a normal month, this month in the Chicago territory we have been denied the

benefit of the best season of the year, and at a time when we are throwing into the market a great deal more advertising, and a great deal more money in attempting to service retailers on the point of purchases and the display of materials. I have national experience with the immediate effect of price cutting on our merchandise. I have observed it in the State of Illinois and in the City of Chicago. It has been detrimental, it hurts in this way: the moment a price cutter attempts to take advantage of the prestige or advertising of a line of goods such as Seagram's, and makes it—follows through the well known racket by making that item a loss leader, which means that he sells it at a lower price than say the small independent merchant can buy it at, it prompts the legitimate, honest merchant, who pays his rent, [fol. 20-93] and wants to have a credit standing, to hide the goods, because unless he offers it at the same price the public will soon regard the honest merchant as being a high priced man, over priced in every line, and they will pass up his store. So that the direct effect of price cutting is for all other merchants to hide the goods and to say, "We are out," and very often in protecting themselves they say, "Well, this item is not as good as it used to be," so that he can sell another item on which the price has not been cut. It leads to a general substitution and panic on the part of the real merchant, because he knows he has invested in those goods money representing from 40 per cent to 60 per cent of the value, and that that loss is irretrievable because he cannot get his taxes back from the Government or the state, and he cannot afford to take that loss. Again it means that there is a general suppression of the line on the part of the honest merchant when a price cutting is made and advertised. This all applies to the situation in the City of Chicago. It applies to the period following the 15th of November to date, here in Chicago.

Our orders have absolutely dropped. I, personally have endeavored to influence distributors and some retailers to buy goods and their answer is "No". The reason assigned is that "that we can make no profit on Seagram's; that we cannot meet the competition of the price cutting of the defendant."

Cross-examination.

By Mr. Breakstone:

I am responsible for the Chicago office. Mr. McQuade is in direct charge but I am responsible for it to the home office. I am the executive vice-president of the Seagram-[fol. 20-94] Distillers Corporation. I am consulted as to the policy pursued by the local office. Their accounts conducted under and pursuant to the decision or policy are approved by me. I never saw Defendant's Exhibit 29 before. I do not know whether or not Defendant's Exhibit 29 was sent out by the plaintiff.

Mr. Isaac Mayer: There will be no objection if we know what it is (referring to Defendant's Exhibit 29 and its proposed introduction into evidence; Exhibit 29 being a telegram sent by plaintiff).

Mr. Isaac Mayer: Some telegram to that effect was sent out; whether that is verbatim ad literatim, I do not know, but there is no objection to your offering it in evidence. (Referring to Defendant's Exhibit 30.)

Mr. Richard Mayer: A copy of this was intended to be sent out and is in possession of the plaintiff.

Mr. Isaac Mayer: (Referring to Defendant's Exhibits 29 and 30.) There is no objection to them being offered in evidence.

Mr. Breakstone: I offer them in evidence as Defendant's Exhibits 29 and 30.

(Thereupon Defendant's Exhibits 29 and 30 were introduced in evidence without objection and are as follows:)

[fol. 20-95] DEFENDANT'S EXHIBIT 29

(Western Union Telegram)

Received at 2655 N. Clark St., Chicago, Ill.

Diversey 4321.
1935 Nov. 26 PM 10 35.

CAF496 75 DL—Chicago Ill 902P
Goldblatt Bros Inc—
3149 Lincoln Ave—

Warning Stop Seagram Price Policy Upheld Stop Judge G. Fred Rush of the Cook County Circuit Court in Finding

a Retailer Guilty of Cutting Prices on Seagrams Products Today Held Seagrams Fair Trade Contracts To Be Valid And That The Illinois Fair Trade Act Is Constitutional Judge Rush Also Held That Seagrams Required No Injunction To Restrain Price Cutting Because Seagrams Was Sufficiently Protected By Its Clear Right To Recover Damages From The Price Cutter—

Seagram Distillers Corp.

DEFENDANT'S EXHIBIT 30

(Being on an enlarged form of a Western Union Telegram Blank)

Check 75 DL.
Acct'g Infmn. Charge.
Time Filed 9:05 PM.

Chicago Illinois November 26 1935.

To All Illinois Liquor Dealers

Warning Stop Seagram Price Policy Upheld Stop Judge G Fred Rush Of The Cook County Circuit Court In Finding a Retailer Guilty Of Cutting Prices On Seagrams Products Today Held Seagrams Fair Trade Contracts To Be Valid And That The Illinois Fair Trade Act Is Constitutional Judge Rush Also Held That Seagrams Required No Injunction To Restrain Price Cutting Because Seagrams Was Sufficiently Protected By Its Clear Right To Recover Damages From The Price Cutter

Seagram Distillers Corporation.

[fol. 20-96] The Witness: Before I left our New York office we received a telegram in effect quoting the telegram supposed to be sent out by the Chicago office. There are two schools of economics on the question of whether or not price cutting is good or bad. There is disagreement on the subject. All I know is this; that the Illinois legislature approved a Fair Trade Act, we were asked to operate under it. We conformed to the law, and find in our experience that those laws will supply protection to the manufacturer but are mainly in the interest of the small independent merchant, for the reason that while we have subscribed to the Illinois Fair Trade Act, while it benefits us, it benefits mostly the retailer and the distributor.

Price cutting is mostly destructive to the merchants. In effect it might easily increase the manufacturer's business, but in the end it destroys the retailer. Sometimes the manufacturer would benefit by price cutting by the largely augmented sale. Wherever there is a Fair Trade Act and the manufacturer does not conform to it, he is crucified by the retailers, so it injures us materially, and destroys our business in Illinois, because we are powerless, and for that reason appealed for relief at this time in behalf of the losses we are suffering as well as the losses the retailers are suffering. Seagram-Distillers Corporation is purely a selling corporation, employing nothing but salesmen and warehouse men. We are purely a sales company. We have no distilleries in Illinois. None of our affiliated corporations operating as distillers carry on distilling in Illinois. All the products that are disposed of in Illinois are brought in from Indiana and Maryland usually. The consumer does not benefit by the sale of our merchandise below the stipulated price.

[fol. 20-97] Price cutting is a form of racket that leads to substitution; it is merely a trick to get people in and offer them goods at a higher price based on quality; that is in merchandising circles the advantage of price cutting and it is going out of the picture very fast as a merchandising trick. Chicago is the hotbed of price cutting and hundreds of honest merchants in Chicago are asking relief.

They sometimes call price cutters chiselers, but racket is a generic term. Price cutting is a form of racket, using the generic term. I use the term innocently, not viciously.

The best of the 5 Crown whiskey is four years old. 5 Crown and 7 Crown are a blend. The other stuff used in the blend may be a year old or two years old. 7 Crown has a high old whiskey content. Four year old bonded whiskey is the base of both the 5 Crown and the 7 Crown. 5 Crown is considered the finest medium priced whiskey; but it is the cheapest product produced by Seagrams. 7 Crown is higher priced high quality whiskey. Seagram's Ancient Bottle is the very finest whiskey available, bonded whiskey. It is six years old bottled in bond. This Ancient Bottle is six years in the height of its maturity. It is in full bloom. Any older whiskey, and we have whiskeys up to thirty years old, becomes woody. They go through too long a stage in the wood and contain poison. Six to eight year old whiskey is the best that can be obtained.

The plaintiff corporation was formed in late December of 1933 or early part of January, 1934.

We have been in business here not quite two years. Seagram's products are in highest demand right to-day nationally. We were the last ones to come into the market. [fol. 20-98] We could not get into this market because of our competitors. It took us time to form an American organization. When we came into the market in January we could make no headway. The biggest demand for Seagrams is to-day at the height of the competition when everybody else has more whiskey to supply than we have. Our competition is at its heaviest to-day and yet we sell 30 per cent to 50 per cent of the bonded whiskey in America and in Chicago, Illinois. Our business is at a standstill, though our competition is at the high point to-day. Everybody has taken advantage of Seagram's embarrassment purely because of the local situation.

We are not suffering from competition in this market any more than we are in any other market. We are suffering now in the same relations that we are suffering anywhere. We have the same competition everywhere except due to the present local condition with respect to price cutting. Our opportunity for selling our goods has been destroyed.

I inspect a certified copy of the statement taken from our general books every day. Our corporation tries to get retail sales contracts of the nature of Exhibit 1 in this case signed by everybody we do business with. We permit our distributors to sell retailers who have not signed any such contracts, pending the signing of same. It takes time to get all these contracts signed up.

Redirect examination.

By Mr. Richard Mayer:

V-O is six years old. We have Ancient Bottle which is six years and some five years old. When we first brought it out it was five years old.

Mr. Richard Mayer: That is all.

The Court: Any further evidence?

[fol. 20-99] Mr. Richard Mayer: No, your Honor.

The Court: Any further testimony, Mr. Breakstone?

Mr. Breakstone: No further testimony.

The Court: You may have your injunction. I do not wish to hear any more argument.

Certificate to report of trial proceedings by Court.

Stipulation to incorporate original report of trial proceedings.

Clerk's certificate.

Irving Breakstone and Irving Greenspahn, Attorneys for Defendant and Appellant.

[fols. 21–25] IN SUPREME COURT OF ILLINOIS

Docket No. 23475—Agenda 27—April, 1936

THE JOSEPH TRINER CORPORATION, Appellee,

v.

CARL W. MCNEIL, Appellant

OPINION—Filed June 10, 1936

Mr. Justice WILSON delivered the opinion of the court:

This is a proceeding instituted by the plaintiff seeking relief under the provisions of the Fair Trade act, approved July 8, 1935. (Ill. State Bar Stat. 1935, p. 3091; Smith's Stat. 1935, p. 2893.) The title of the statute expresses its purpose as "An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade-mark, brand or name." Section 1 provides:

"Sec. 1. No contract relating to the sale or re-sale of a commodity which bears, or the label or content of which bears, the trade-mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

"(1) That the buyer will not re-sell such commodity except at the price stipulated by the vendor.

"(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such

purchaser agree that he will not, in turn, re-sell except at the price stipulated by such producer or vendee.

"Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

"(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity: provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice price, at least ten (10) days before such stock shall be offered for sale to the public.

"(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

"(3) By any officer acting under the orders of any court."

There appears to be no serious contention that the act, up to this point, is invalid and unenforcible. We are particularly concerned with section 2, which declares that "willfully and knowingly advertising, offering for sale or selling [fol. 26] any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby." The third section provides that the act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or re-sale prices. The Fair Trade act thus permits vertical re-sale price maintenance, but condemns, as do the Federal and State Anti-trust laws, horizontal arrangements for fixing prices. The act prescribes no criminal penalties.

The facts upon which this action is predicated are not in dispute. Schenley Distributors, Inc., licensed to transact business in Illinois, is the sole sales agent and representative in this State for certain liquors and alcoholic beverages manufactured by several affiliated distilleries known as the Schenley distilleries. "Old Quaker" is the brand name of one of the Schenley products, and the name has

been duly registered as a trade-mark with the United States patent office. Affixed to each bottle of Old Quaker is a distinctive label, upon which appear the figure of a Quaker standing before a sheaf of grain, a sack of malt, and three barrels marked "Old Quaker Whisky." Above the picture is the legend, "Bottled at the Distillery. Old Quaker. Reg. U. S. Pat. Off. Brand." The name "Old Quaker" appears in bold lettering. Below the picture there is this statement: "One pint. Straight bourbon whisky. Distilled and bottled by the Old Quaker Company. Distillers. Lawrenceburg, Indiana. Division of Schenley Products Company." The whisky has been sold and retailed under the trade-mark which definitely designates the brand and has become well known to the trade. This brand is detailed at $1.89 per quart, 98 cents per pint and 50 cents per one-half pint. These prices, under existing conditions, appear to be fair prices when considered with like commodities.

The method of merchandising Old Quaker, as set forth in the complaint, is as follows: Schenley Distributors, Inc., the sales agent, sells to ten wholesale distributors in Chicago, one of whom is the plaintiff, suggesting to these local distributors a minimum retail price which it fixes as the uniform retail price for Old Quaker and each of the other brands of Schenley products to be sold in Chicago. This price is the uniform and standard Schenley retail price. If a distributor sells to a retailer who is known to sell below [fol. 27] the Schenley list price, Schenley Distributors, Inc., refuses further to sell Schenley products to such distributor. The distributors, in turn, refuse to sell Old Quaker, or any other Schenley product, to any retailer in Chicago except on the condition that such retailer will not sell below the uniform Schenley retail price. To that end the plaintiff and the other local distributors make all sales of Old Quaker or other Schenley products under agreements of sale denominated "Fair Trade Agreements," which expressly provide that the retailer will not re-sell in the city except at the uniform and standard Schenley retail price. From the allegations of the complaint it further appears that as a direct result of the trade policy and practice described, approximately eighty-five per cent of the retailers of Schenley products in Chicago consistently maintain the Schenley retail price list for Old Quaker and other Schenley brands.

The Joseph Triner Corporation, the plaintiff, is a domestic corporation engaged in business in Chicago as a wholesale distributor, selling to retailers for re-sale in that city various brands of liquor and alcoholic beverages of standard quality. On November 8, 1935, it brought an action in the circuit court of Cook county to restrain Carl W. McNeil, the defendant, a liquor retail dealer, from selling Old Quaker whiskey in the Chicago district at prices less than those provided in the fair-trade agreements previously mentioned. From the allegations of the complaint, which the defendant by his motion to dismiss admitted to be true, it appears that the plaintiff was also operating pursuant to the trade policy and practice by which the Schenley Distributers, Inc., sought to maintain the prices specified in the fair trade agreements.

The complaint charges that a few vendors of liquor at retail in Chicago pursue a practice of "cutting" the prevailing retail price of brands of liquor which have acquired widespread attention and public favor. These retailers, it is charged, sell the popular brands at prices conspicuously lower than the prevailing price and at a loss or scant return to themselves, for the purpose of attracting the public to their stores and selling other brands of liquor or general merchandise at prices sufficiently high to meet the loss and assure a general profit. The use of "leaders" in this familiar form of price-cutting is asserted to cause irreparable loss not only to the producer of brands sold at the cut-price and to the distributors of such brands but also to the ultimate consumers or general public.

The plaintiff, at the time of filing its complaint, had established a substantial and profitable business in selling at [fol. 28] wholesale Old Quaker and other Schenley products in Chicago. A valuable asset of its business is the good will of the retailers who purchase from it for re-sale in the city the various brands of Schenley products, including Old Quaker. Similarly, the good will of the public and consumers who purchase such products is deemed an important asset. According to the complaint a uniform price assures the retailers comparative immunity from injurious price-cutting by other retailers and a reasonable profit upon their retail sales.

In October, 1935, the defendant, with full knowledge of the fair trade agreements entered into by the plaintiff and

the other local Schenley distributors with substantially all the retailers of liquor in Chicago, threatened to sell, offer for sale and advertise for sale at retail a quantity of Old Quaker at a price appreciably below the uniform Schenley retail price for the brand stipulated in the contracts. On October 16 the plaintiff informed the defendant of its trade policy in maintaining a uniform price for Old Quaker and other Schenley brands throughout the city. In particular, the defendant was advised of the provisions of the fair trade agreements executed conformably to the Fair Trade act. He was also informed of the irreparable injury which would result to the plaintiff if he persisted in executing his threat to "cut" the price of Old Quaker. The plaintiff specifically requested the defendant to refrain from his contemplated course and indicated its willingness to sell to him any Schenley products he might wish, provided he would agree not to sell them at retail below the standard list price. Subsequently, on several occasions the defendant offered for sale, and sold, large quantities of Old Quaker at seventy-seven cents per pint, or more than twenty per cent below the Schenley uniform retail price. The defendant was again urged to desist but refused. On November 8, 1935, he advertised Old Quaker for sale at seventy-seven cents per pint. None of the quantity advertised or sold by the defendant at the cut price was offered for sale, or sold, in the course of closing out any of such quantity for the purpose of discontinuing deliveries, nor because any of the liquor was damaged or deteriorated, nor owing to a court order. In short, the defendant does not come within the exceptions enumerated in section 1 of the Fair Trade act. During this time Old Quaker was in fair and open competition with about ten other brands of the same general class of commodity produced by persons other than the manufacturers of Schenley products.

[fol. 29] The plaintiff charged that as a consequence of the defendant's conduct a great number of retailers in the area where the defendant's store was located threatened to violate their contracts with it and the other local Schenley distributors by meeting the competitive price fixed by the defendant, and that several of the retailers did, in fact, breach their agreements. The result of meeting the cut-price established by the defendant was that the sales at the reduced prices did not yield the retailers a

fair and reasonable profit, and that when the public requested Old Quaker some of the merchants offered their customers substitute brands.

The concluding allegations of the complaint are, that if the defendant continues his practice the plaintiff will suffer irreparable injury to its business in the following respects: (1) Retailers who have signed fair trade agreements will be compelled to violate their agreements and sell below the Schenley standard price; (2) the cut-price will cause the public and consumers to believe that Old Quaker is not worth the uniform retail price, and, in consequence, the retailers will be unable to sell at the standard price; (3) great loss to the good will established by the local distributors will ensue and the value of the trademarks and trade-names of the Schenley products destroyed; (4) the public will become confused as to the various brands of such products; and (5) the market for them in Chicago will become demoralized and produce a general uneconomic lowering of prices.

The acts of the defendant previously set forth constituted, according to the plaintiff, an imminent threat to the destruction of its business. Money damages, it was claimed, would not compensate the plaintiff, and restraint of the defendant was alleged to be necessary to prevent multiplicity of legal proceedings.

The defendant, by a motion to dismiss the complaint, challenged the constitutionality of the Fair Trade act. The court held the statute valid and overruled the motion to dismiss. The defendant elected to abide by his pleading, and a decree was entered permanently enjoining him from vending at retail Old Quaker whisky at a price below $1.98 per quart, 98 cents per pint, and 50 cents per one-half pint, until the standard and uniform Schenley retail price for the brand named should be changed in Chicago. To obtain a reversal of that decree the defendant prosecutes this appeal.

The defendant contends that the decree is erroneous for the reason that the Fair Trade act violates the Federal and [fol. 30] State constitutions in the particulars set forth in his motion to dismiss the plaintiff's complaint. The propriety of the remedy employed is not assailed. The single question thus presented for decision is whether the statute squares with the Federal and State constitutions or offends

them in the respects assigned and argued by the defendant.

The contention is made that the Fair Trade act violates the equal protection of the laws provision of the fourteenth amendment to the Federal constitution, the due process clauses of the Federal and State constitutions, and also section 22 of article 4 of the State constitution. To sustain the decree the plaintiff maintains that the Fair Trade act constitutes a valid exercise of the police power, and that the statute is not open to the constitutional objections interposed.

The police power may be exercised not only in the interest of the public health, morals, comfort and safety but also for the promotion of the general welfare. (Fenske Bros. v. Upholsterers Union, 358 Ill. 239; City of Aurora v. Burns, 319 id. 84.) The case last cited contains a notable exposition of the doctrine that the police power of the State is not a static or dormant concept but is sufficiently dynamic to meet the varying needs of modern society. This court, in sustaining the validity of a zoning ordinance, observed: "With the growth and development of the State the police power necessarily develops, within reasonable bounds, to meet the changing conditions. (Public Utilities Com. v. City of Quincy, 290 Ill. 360.) The power is not circumscribed by precedents arising out of past conditions, but is elastic and capable of expansion in order to keep pace with human progress. Mr. Justice Holmes well defined the nature and extent of the power in Noble State Bank v. Haskell, 219 U. S. 104: 'It may be said in a general way that the police power extends to all the great public needs. (Camfield v. United States, 167 U. S. 518.) It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.' "

Legislatures have long endeavored to promote free competition by laws aimed at trusts and monopolies such as the Anti-Trust act of this State, enacted in 1891. (Ill. State Bar Stat. 1935, p. 1235; Smith's Stat. 1935, p. 1201.) It is manifest that when the General Assembly enacted the Fair Trade act in 1935 it was attempting to modify its [fol. 31] former policy and to adopt an economic concept which has received widespread popular approval in recent years. The gist of the theory is that the manufacturer of a trade-marked article sold in competition with articles of

similar nature, who has designated a fair price at which he, as well as his distributor and retailer, can make a fair profit, has a property right in the good will towards his product which he has created, and that it is sound public policy to protect that property right against destruction by others who have no interest in it except to employ it in a misleading manner for the purpose of deceiving the public. "The basic theory on which this concept rests," observed the California Supreme Court in Max Factor & Co. v. Kunsman, 55 Pac. (2d.) 177, "is that, from a social standpoint, price cutting, in the long run, adversely affects the public interest, and that the public will be adequately protected against excessive prices by the ordinary play of fair and honest competition between manufacturers of similar products." Section 2 of the California Fair Trade act, as does section 3 of our law, prohibits manufacturers from contracting between themselves to fix re-sale prices.

To the extent that the Fair Trade act effects a change in the economic public policy of this State we have no power to interfere. It is wholly immaterial whether the individual members of this court agree with the economic and social philosophy upon which the Fair Trade act is established, and no duty rests upon us to pass upon the wisdom of the economic public policy which it declares. That function is wholly legislative. It is not a judicial function to lecture either the public or business. Neither is it within the province of a court to philosophize concerning economic conditions. In passing, however, we cannot help but note that many of the present legislative enactments, such as the Fair Trade acts of New York, California and Illinois, are resultants brought about because of the failure of the public, and particularly the business public, to observe those ethical principles which lie at the very foundation of fair dealing and business honesty. The shady efforts made by some to obtain an unfair advantage over others are not compatible with good citizenship nor in keeping with the best traditions of the law merchant as known at the common law. If public opinion cannot check these practices then business can expect legislatures to attempt to remedy them.

The Fair Trade act is intended to curb one of these [fol. 32] practices by protecting the manufacturer who has built up a brand or article based on quality and excellence

and preventing its use as a "loss leader" by those who would sell it for the purpose only of inveigling the public into patronizing their places of business, in the hope of obtaining a profit on other goods of inferior quality. In other words, the reputation of the one is used for the personal advantage of the other. The legislative determination of whether this statute is a proper exercise of the police power, however, is not necessarily conclusive. Whether the means employed have any real, substantial relation to the public health, comfort, safety or welfare, or are essentially arbitrary and unreasonable, is a question which is subject to review by the courts. People v. Belcastro, 356 Ill. 144; People v. Rosehill Cemetery Co. 334 id. 555; Condon v. Village of Forest Park, 278 id. 218; People v. Steele, 231 id. 340.

The defendant maintains that section 2 of the Fair Trade act arbitrarily deprives him of his right to determine the price at which he will sell his commodities, and, in consequence, violates the due process clauses of the Federal and State constitutions. The right asserted is not unfettered, and is, of course, subject to the legitimate exercise of the police power. Although we find that only two courts of last resort have passed upon the validity of Fair Trade acts such as the one in controversy, an analogous statute was held constitutional nearly twenty years ago—Ingersoll & Bro. v. Hahne & Co. 88 N. J. Eq. 222, 101 Atl. 1030. A statute of the State of New Jersey enacted in 1916 declared it unlawful for any merchant, firm or corporation to appropriate for his or their own use a name, brand, trademark, reputation or good will of any maker in whose product they dealt, or to discriminate against it by depreciating the value of the product in the public mind by misrepresentation as to value or quality or by price inducement, except where the goods did not carry a notice prohibiting such practice. The factual situation disclosed that the complainant, a manufacturer of watches, sold under the Ingersoll name, among others, a watch known as the "Yankee Watch." This product was advertised throughout the United States to be sold to the consumer at $1.35. The complainant charged that the only method by which the watches could be sold for this low price was to manufacture them in immense quantities, and that the only way to obtain customers upon a large scale was by extensive advertising; that the name "Ingersoll" and the reputation of

[fol. 33] the firm for fair dealing and reliable products was nation wide; that it was absolutely necessary, as a part of the advertising and building up of the business, that a definite fixed price should form a part of the advertising for each of the products, and that all the Ingersoll watches were sold subject to a notice forbidding the retailer to dispose of them for less than a price fixed by the manufacturer. A jobber in New York disposed of the watches to a New Jersey retailer who sold them for less than the standard price. Upon the facts presented the statute was held valid. The vice-chancellor in his opinion said: "Complainant has no monopoly. Its goods are not manufactured under patents. It is constantly in competition with manufacturers of cheap watches. Not only is it morally bound as a result of its advertising to guarantee its product, but it, in fact, guarantees it in writing. The defendant makes use of the name, reputation, and guaranty of complainant for its own ulterior purpose and appropriates to itself the effect of the extensive advertising, upon which the complainant depends, for defendant's own profit, in violation of the contract expresed in the notice, and with no desire to benefit the public. A retailer does not sell a standard article at a loss for eleemosynary purposes." The injunction granted the complainant was subsequently made permanent in Ingersoll & Bro. v. Hahne & Co. 89 N. J. Eq. 332, 108 Atl. 128. The same jurist in this later case pointed out that, even in the absence of statute, contracts relating to trade and containing restraints are valid if such restraints are reasonable. In particular, the court said: "It is also well recognized that a person has a property interest in his trade-name and good will, and will, even in the absence of statute, be protected against injury to that trade-name and good will. This right has in this State been as above indicated recognized by statute. * * * In those cases in which the right to fix a re-sale price has been under consideration, the prohibition against the re-sale has been against the re-sale of the article itself. The name or trade-mark or what not has been so much an integral part of the article as that a re-sale of the article without reference to the trade-mark or trade-name would be practically impossible. In the case at bar the prohibition is not against a re-sale of the article, nor is it impracticable to re-sell the article without reference to the trade-name. * * * Complainant does not seek to

retain any right in the article itself; it merely seeks to re-[fol. 34] strain the use of its trade-name and good will, except under conditions fixed by it. It may permit the purchaser of the article to use its trade-name and good will under such conditions as it sees fit. * * * It seems to me that there is a clear distinction between those cases in which the nature of the restraint is such as necessarily to affect the re-sale of the article itself and the case at bar where the nature of the restraint is not such."

The contention was made in the celebrated case of Nebbia v. New York, 291 U. S. 502, that because the Milk-control law of New York essayed to control prices it denied due process. The Supreme Court of the United States, in answering this contention, said: "The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the State is incapable of directly controlling the price itself. This view was negatived many years ago.—Munn v. Illinois, 94 U. S. 113." The court reviewed numerous decisions (German Alliance Ins. Co. v. Lewis, 233 U. S. 389, Griffith v. Connecticut, 218 id. 563, O'Gorman & Young v. Hartford Fire Ins. Co. 282 id. 251, Frisbie v. United States, 157 id. 160, Yeiser v. Dysart, 267 id. 540, Cotting v. Kansas City Stockyards Co. 183 id. 79, and Stephenson v. Binford, 287 id. 251,) showing that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices. The court then observed: "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the fifth and fourteenth amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. (Wolff Packing Co. v. Industrial Court, 262 U. S. 522, 535.) The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest,'

and 'clothed with a public use,' have been brought forward as the criteria of the validity of price control, it has been [fol. 35] admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the State may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."

The defendant, however, invokes Doubleday, Doran & Co. v. Macy & Co. 269 N. Y. 272, 199 N. E. 409, in which section 2 of the New York Fair Trade act, identical with the same section of our statute assailed in the present case, was held unconstitutional as applied to the facts set forth in the complaint. The articles in question were books. The Doubleday books are not "commodities" within the accepted meaning of the term. Each book rests upon its own merit, and outside of the binding and paper content it bears no similarity to the intent of the term used in the act, namely, commodities. A general statute such as the Fair Trade act may, of course, be invalid when applied to one set of facts and clearly valid when applied to other fact situations. (Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282.) The court in Max Factor & Co. v. Kunsman, supra, distinguished the Doubleday, Doran & Co. decision and held it inapplicable to the facts presented in the California case. The court said: "The plaintiffs in the New York case were Doubleday, Doran & Co. Inc., publishers, and Doubleday Doran Book Shops, Inc., retailers. The contract mentioned in the decision is one between the publishing corporation and the retailing corporation. Aside from any inference to be drawn from the similarity of names, the opinion states that the two plaintiffs, in reality, were one and the same, for it refers to 'the price which they (the plaintiffs) stipulated as a retail price in a *contract between themselves.*' Other language indicates the book shop corporation is merely a subsidiary and agent of the publishing company. Again, the plaintiff publishers sold the books in question to the defendant without exacting or,

in so far as appears, attempting to exact from the buyer any restriction on the price for re-sale. In other words, the producer of goods placed a retail price upon its product by its own independent action, and voluntarily sold the goods to a retailer (Macy & Co.) for re-sale without seeking, [fol. 36] or at least obtaining, any agreement by the retailer to observe any retail price. In the action, it seeks to prevent the retailer, to whom it has sold the goods without restrictions, from selling the goods at prices less than those which the producer saw fit to fix, in a contract between it and a subsidiary. The New York court accepts, for the purpose of the decision, the interpretation of the act as covering such situation, and upon that assumption, and apparently that assumption alone, holds section 2 of the act to be unconstitutional. The plaintiffs in the New York case allege only a single contract purporting to fix the re-sale prices, and that in a pretended contract made with itself, far different from the factual set-up in the Max Factor & Co. case. Here there has been adopted a system of making written contracts, generally between producers and retail distributors, under which the products may and will be sold only to retailers who will re-sell at specified prices and have entered into contracts with the distributor to so sell such products. Practically all of the wholesale and retail druggists in California have executed such contracts, and are observing them, and the plaintiffs' distributors have refused, and will refuse, to sell such products to wholesalers or retailers who do not enter into such contracts. A contract has been tendered to defendant for execution, but defendant will not enter into the agreement. The plaintiffs therefore declined to sell the commodities to defendant unless the defendant enters into the contract. The defendant, with full knowledge of the system of contracts, and the extent of the execution and compliance with their terms by the trade, has obtained Factor products 'unbeknown' to plaintiffs, and is selling them at prices less than the prices fixed by the contracts so extensively entered into by others. These facts serve to vitally differentiate the situation in New York from that here."

The defendant argues, however, that the Fair Trade act creates an arbitrary classification of persons and grants to such persons special privileges and immunities, in contravention of the constitutional guaranties invoked. He as-

serts that the vendors and vendees of commodities bearing the trade-mark, brand or name of the producer or owner may, under certain circumstances, fix the re-sale price thereof immune from the criminal penalties prescribed by the Anti-Trust act. The argument rests upon the assumption that there is no rational basis for denying to the vendors and vendees of commodities not bearing such [fol. 37] trade-mark symbols the right to fix the re-sale price without incurring the penalties of the Anti-Trust act.

The first section of the fourteenth amendment to the Federal constitution declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The fourteenth amendment does not purport to prevent a State, however, from adjusting its legislation to differences in situation, and to that end to make a justifiable classification. It merely requires that the classification shall be based on a real and substantial difference having a rational relation to the subject of the particular legislation. Nebbia v. New York, supra; Power Manufacturing Co. v. Saunders, 274 U. S. 490; Lindsley v. Natural Carbonic Gas Co. 220 id. 61; Magoun v. Illinois Trust and Savings Bank, 170 id. 283; Michigan Millers Ins. Co. v. McDonough, 358 Ill. 575; Stewart v. Brady, 300 id. 425.

Supplementing the equal protection provision of the fourteenth amendment, section 22 of article 4 of the constitution of this State prohibits the passage of a special law granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. The purpose of this provision is to prevent the enlargement of the rights of one or more persons and the impairment of or discrimination against the rights of others. To avoid falling within the constitutional inhibition of special legislation, the classfication of subjects or objects must be based upon some reasonable and substantial difference in kind, situation or circumstance bearing a proper relation to the purposes to be attained by the statute. Michigan Millers Ins. Co. v. McDonough, supra; Jones v. Chicago, Rock Island and Pacific Railway Co. 231 Ill. 302.

The California Supreme Court, in passing upon the validity of the Fair Trade act of California, section 1½

of which corresponds to the Fair Trade act of our State, (Max Factor & Co. v. Kunsman, supra) said: "Respondent also urges that the statute denies equal protection of the laws in that it applies only to articles sold under a trade-mark or trade or brand-name, and does not apply to non-trade-marked commodities, and, among trade-marked articles, applies only to those in free and open competition with others of a similar nature. As already pointed out, [fol. 38] it is only in reference to those commodities included within the statute that the manufacturer or producer has a property right in the nature of good will, which, in the public interest, should be protected. Such a classification is reasonable. The exclusion of trade-marked articles not in free and open competition with others of a similar nature is likewise reasonable. By that provision the public is protected from artificially high prices imposed by one with an exclusive market."

The Anti-Trust act expresses the public policy of the State against trusts and combinations organized for the purpose of suppressing competition and creating monopoly. (Harding v. American Glucose Co. 182 Ill. 551.) The Fair Trade act does not assume to permit restrictions on the price at which trade-marked commodities may be re-sold, irrespective of whether re-sold under the trade-mark. It permits restrictions to be placed on the use of trade-marks, names and brands—not restrictions on the price of commodities generally, except, as the plaintiff contends, to the extent that new commodities may become involved in an attempt to damage the good will built around a trade-mark, name or brand. The manifest legislative intent is the protection of the property interest in a mark, name or brand by preventing the use of the symbol by price-cutting retailers in ways likely to depreciate the property interest. Such competitors could also destroy a commodity built on merit by underselling, and thus destroying the purpose of the label intended to signify quality. As applied to the present case, by using the trade-name of a well known liquor the defendant, in effect, attracts the public to his store, and thereby induces the visitors to become the purchasers of other goods offered for sale. The defendant thus benefits at the expense of the trade-name "Old Quaker" by using the plaintiff's products as a means to draw trade. Price-cutting primarily injures the owner of a good will which has become identified with a trade-mark, brand or

name, on a commodity competing in the market with other goods of the same general class. On the other hand, the manufacturers and distributors of commodities which bear no trade symbol obviously cannot have a good will which requires the protection afforded by the Fair Trade act.

The only re-sale price maintenance, if any, permitted by the Fair Trade act is vertical. Vertical price maintenance merely enables a producer, or his distributor, to set a price at which the trade-marked commodity shall be sold [fol. 39] to the consumer. Section 1 specifically provides that a commodity, in order to be subject to the contracts permitted under the Fair Trade act, must be "in fair and open competition with commodities of the same general class produced by others." Section 3 declares that the act shall not apply to any contract or agreement between producers, or between wholesalers, or between retailers, as to sale or re-sale prices. In short, it does not apply to horizontal price maintenance. The statute clearly does not even tend to legalize trusts or monopolies. It does tend to prohibit trusts and monopolies. (Ingersoll & Bro. v. Hahne & Co. supra; Fisher Flouring Mills Co. v. Swanson, 76 Wash. 649, 137 Pac. 144.) Application of section 2 of the statute to the facts discloses that Old Quaker whisky is in competition with other whiskies of like grade being sold in the Chicago market. No restraint rests upon the defendant inhibiting him from dealing in the competing goods of other products of the same general class sold by the plaintiff. He can freely sell whisky at a lower price than the standard price for Old Quaker. The statute merely prevents him from filching the good will associated with the descriptive mark and name "Old Quaker" for his own ulterior purposes.

Horwich v. Walker-Gordon Laboratory Co. 205 Ill. 497, is cited, however, to support the defendant's position that the Fair Trade act violates the constitutional limitations against arbitrary classification. This court, in the case relied upon, held that the Trade-mark act of 1901 violated section 22 of article 4 of our constitution. Section 2 of the statute declared it illegal for any person, without the written consent of the owner, to sell certain receptacles bearing the trade-mark, brand or name of the owner. Section 3 made the possession by any junk dealer of receptacles bearing registered trade-marks, prima facie evi-

dence that such possession was unlawful. The fourth section prescribed criminal penalties for the violation of the provisions of the act. An action was brought under section 6, which provided that any person might be enjoined from violating the second section. The court pointed out that the purpose of the statute was to facilitate the recovery of the receptacles described in the first section which had passed from the possession of their owners to others and which the owners desired to recover summarily. On the other hand, the Fair Trade act of 1935 has for its major objective the preservation and protection of the property interest of the producer and his distributors in the good [fol. 40] will represented by brands, trade-marks and trade-names. The law is also designed to protect the consumer's interests. The legislature by this act has attempted to benefit alike the producer, the distributor and the public. It is apparent that the objective of the Fair Trade act is not some purely personal goal, such as the summary recovery of certain types of personal property. The Horwich case, it is true, dealt with trade-marks, but solely in their character as indicia of ownership. In the present case the statute attacked deals not only with trade-marks in that respect, but also with the good will built up by a producer or distributor around a trade-mark, trade-name or brand, and provides that certain conduct with respect to the use of such trade-marks, names or brands constitutes unfair competition.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, is also invoked to sustain the defendant's position. The Illinois Trust act of June 20, 1893, prohibited trusts or combinations in restraint of trade or competition. Section 9 excepted from the provisions of the act agricultural products or livestock while in the hands of the producer or raiser. Section 10 provided that the purchaser of any article or commodity from such a trust or combination should not be liable for the price and might plead the act as a defense to any action therefor. Suit was brought to recover for the sale of sewer pipe and the statute was pleaded as a defense. The United States Supreme Court held that the discrimination created by the ninth section rendered the act repugnant to the provisions of the fourteenth amendment, respecting the equal protection of the laws.

The defendant argues that no distinction can be drawn between the classification condemned in the Connolly case, supra, and that provided by the Fair Trade act. The argument rests upon the premise that the Fair Trade act, in like manner as the Trust act of 1893, creates an unfair and arbitrary classification, in flagrant violation of the constitutional guaranty of equal protection of the laws. It is urged that the new law attempts to legalize business practices which have long been deemed illegal under the Anti-Trust act. The arguments are based upon erroneous premises and therefore must fall. The Anti-Trust act was never intended to interfere with the protection given to the good will established around the use of a trade-mark, brand or name. Obviously, it does not even purport to render illegal the conduct sanctioned by the Fair Trade act. Moreover, a retailer such as the defendant is not expressly pro- [fol. 41] hibited from removing the trade symbol and selling the whisky which he owns, at whatever price he pleases. Manifestly, there can be no interference with the enforcement of the Anti-Trust law under such circumstances.

An insuperable objection to the validity of the Fair Trade act, the defendant insists, is that the provisions of the statute are so incomplete, vague, indefinite and uncertain that men of ordinary intelligence must necessarily guess at their meaning and differ as to their application. Statutes vulnerable to the objection stated have been declared unconstitutional as denying due process. (Champlin Refining Co. v. Commission, 286 U. S. 210; Parks v. Libby-Owens-Ford Glass Co. 360 Ill. 130.) On the other hand, where the words assailed, taken in connection with the context, are commonly understood, their use does not render a statute invalid. (People v. Huls, 355 Ill. 412.) Furthermore, the legislature is not required to define words in common and daily use. (People v. Lloyd, 304 Ill. 23.) A statute is sufficiently certain if the words and phrases employed have a technical or other special meaning well enough known to enable those within their reach to correctly apply them. (Hygrade Provision Co. v. Sherman, 266 U. S. 497; Omaechevarria v. Idaho, 246 id. 343; People v. Mueller, 352 Ill. 124; Amberson v. Amberson, 349 id. 249; Kowalczyk v. Swift & Co. 329 id. 308.) In the light of these authorities the following words and expressions

segregated and scrutinized by the defendant are not so ambiguous as to render the Fair Trade act void for uncertainty: "Articles of standard quality," employed only in the title; the phrase "in fair and open competition," in section 1; the words "any commodity," and the expression "any contract entered into pursuant to the provisions of section 1," in section 2.

The remaining contention which requires consideration is that section 2 of the Fair Trade act contravenes section 1 of article 4 of the constitution of this State, which provides that the legislative power shall be vested in the General Assembly. It is argued that section 2 delegates to such individuals as choose to avail themselves of the benefits of the statute the power to regulate the prices of commodities sold by others. The contention, and the argument supporting it, rest upon the unwarranted assumption that the Fair Trade act is primarily, and not incidentally, a price-fixing statute. In referring to the purpose of the California Fair Trade act the Supreme Court of that State said [fols. 42 & 43] that the act did not merely prohibit price-cutting for the purpose of regulating prices, but also prohibited the practice in a legitimate legislative attempt to afford protection to the validly-acquired rights of others. (Max Factor & Co. v. Kunsman, supra.) The Fair Trade act of this State does not even attempt to fix or delegate to others the right to fix the price at which any commodity may be sold in the market. It is true, however, that re-sale price maintenance laws, such as the Fair Trade acts of California, New York and Illinois, constitute permissive or conditional legislation. Specifically, our statute does not contain any mandatory requirements, nor does it fix the prices which are to be imposed. No question of governmental price-fixing is, in consequence, involved. In other words, the law would remain wholly inefficacious unless the conditions which it prescribes are met. The plaintiff, for example, is not commanded to operate under it. Only in the event that manufacturers or distributors elect to avail themselves of its provisions does the statute come into actual operation. This does not mean that the act took effect upon the approval of any authority other than the legislative branch of our State government. (Commonwealth v. Goldburg, 167 Ky. 96, 180 S. W. 68.) When the Fair Trade act was passed by the General Assembly it

was a complete statute, in no manner dependent for approval or disapproval by any person or group of persons. The defendant's contention that the statute unlawfully delegates legislative power is without merit.

Two objections interposed in the trial court, namely, that the Fair Trade act violates the constitutional provisions against legislation impairing the obligation of contracts, and that it constitutes an invalid attempt to regulate the sale of commodities in interstate commerce, have not been argued on this appeal. They do not, therefore, require consideration.

The decree of the trial court is right, and it will be affirmed.

Decree affirmed.

[fol. 44] In Supreme Court of Illinois, April Term, 1936

Agenda 37

No. 23531

Seagram-Distillers Corporation, Appellee,

v.

Old Dearborn Distributing Company, Appellant

Appeal from Circuit Court Cook County

Opinion—Filed June 17, 1936

Mr. Justice Jones delivered the opinion of the Court:

At the suit of Seagram-Distillers Corporation the Circuit Court of Cook County permanently enjoined Old Dearborn Distributing Company from wilfully and knowingly advertising, offering for sale, or selling "Seagram's" or "Kessler's" products in this state at less than the prices stipulated by plaintiff from time to time, under the "Fair Trade Act", in accordance with the terms of contracts made pursuant to that Act between plaintiff and distributors or retailers. There is no material dispute as to the facts. Plaintiff, a Delaware corporation, licensed to do business in Illinois deals in alcoholic beverages solely at wholesale. It does not manufacture but buys Seagram's whiskeys and

gins and Kessler's blended whiskeys from the producers, Joseph E. Seagram & Sons, Ltd., Joseph E. Seagram & Sons, Inc., and affiliated corporations. Its place of business in this state is in the city of Chicago. It has been so engaged in business since July, 1934. The commodities it sells bear labels and trademarks and they are in fair and open [fol. 45] competition with commodities of the same general class produced by others. Defendant is a corporation operating four retail liquor stores in the City of Chicago. Its charter powers include sales at both wholesale and retail. Plaintiff's sales in Chicago have been confined to wholesale distributors. It has never sold any of the products in controversy to defendant but has sold other liquors to it. Contracts in conformity with the terms of the Fair Trade Act have been executed between plaintiff and certain distributors, and between plaintiff and certain numerous Illinois retailers, although plaintiff does not sell beverages direct to any retailer. One of such contracts was executed by plaintiff and signed by defendant's secretary and treasurer. The contracts provide that the Seagram products shall not be sold, advertised or offered for sale in Illinois below the prices stipulated by plaintiff. Defendant sold such merchandise at cut prices, but at a profit to itself. It continued to do so after plaintiff's demand that it cease such practice. On account of such price-cutting plaintiff and other retailers dealing in Seagram products suffered a diminution of sales during the price-cutting period. Some dealers took the products from display, and some of them notified plaintiff they could not compete with defendant and would discontinue handling Seagram products unless the price-cutting was stopped. Defendant was a party to breaches of other Fair Trade contracts between plaintiff and certain distributors, and continued the price-cutting throughout the trial of the instant case.

Defendant contends that the Fair Trade Act (Pars. 8-11, chap. 140, Ill. State Bar Stat. 1935) violates several specified provisions of the State and Federal Constitutions, the Sherman Anti-Trust Act, the Anti-Trust Act of this State, and the Federal Trade Commission Act; that resale price-[fol. 46] maintenance contracts are invalid under such constitutional and statutory provisions and are void at common law as unfair competition. These contentions are an-

swered adversely to defendant's claim in The Joseph Triner Corporation v. Carl W. McNeil, No. 23475 decided at the present term of this court. That opinion sets out the pertinent provisions of the Act and they need not be repeated here.

The claim that the transactions between plaintiff and defendant are interstate transactions must likewise be denied. Plaintiff maintains a warehouse in Chicago and all of its purchases are delivered there from the producers. The products are not shipped to plaintiff's customers from outside the state but are delivered from its Chicago warehouse. They are in no sense interstate transactions. (Rudin v. King-Richardson Co. 311 Ill. 513; Schechter Poultry Corporation v. U. S. 295 U. S. 495.)

Neither does the Act violate Section 13 of Article IV of the Constitution of this state by amending the Illinois Anti-Trust Act without including that subject in the title. The Fair Trade Act is complete within itself and does not purport either in its title or in the body thereof to amend or revive any other Act. Even though it may by implication modify or repeal prior existing statutes, that fact does not constitute a violation of the constitutional provisions. The Constitution does not require that all legal effects of an Act, such as a repeal by implication of a former act, shall be stated in the title. Where the subject of the Act itself is embraced in the title, all legal consequences necessarily flowing from it will, for the purpose of constitutional requirement, be regarded as embraced in the title. (Village of Averyville v. City of Peoria, 335 Ill. 106; People v. Borgeson, id. 136.)

[fol. 47] It is argued that the facts show a conspiracy to stifle competition and fix prices in restraint of trade and that therefore plaintiff comes to court with unclean hands, and cannot maintain its action. There is no showing nor even an attempt to show that plaintiff has entered into an agreement or understanding with any other person or corporation in a like situation to maintain or control the sale price or resale price of any commodity handled by it. Nor does the fact that defendant is a wholesaler take the transactions without the terms of the statute. It does not deal directly with plaintiff. If it desired to purchase at wholesale from plaintiff it would be in the same class

as other distributors to whom plaintiff sells. The relation between plaintiff and the wholesalers to whom it sells is different from the relation among such purchasing wholesalers. It is the same relation that the wholesaler bears to the retailers to whom he sells. Contracts between plaintiff and wholesale distributors or between distributors and retailers, are denominated vertical price-fixing contracts. Such contracts are permitted by the statute. Contracts between producers or between wholesalers or between retailers as to sale or resale prices are denominated horizontal price-fixing contracts and are not within the terms of the statute because of their character as combinations in restraint of trade. Such contracts are uniformly held invalid. The admitted facts show that the transactions in controversy belong in the class of vertical price-fixing contracts, which are not subject to the contention urged.

We are not concerned with the claim that the contract between plaintiff and defendant was not executed by the defendant's proper officers, or that it is invalid for lack of mutuality. Section 2 of the Fair Trade Act applies to wil- [fol. 48] fully and knowingly advertising, offering for sale or selling any commodity at less than the prices stipulated in any contract entered into pursuant to the provisions of Section 1 of the Act, whether the person so doing is or is not a party to such contract.

We are of the opinion that the Fair Trade Act is valid and that under the facts in this record plaintiff was entitled to equitable relief by injunction. The decree of the circuit court was correct and is accordingly affirmed.

Decree affirmed.

[fol. 49] IN SUPREME COURT OF ILLINOIS

No. 23531

SEAGRAM-DISTILLERS CORPORATION, Appellee,

vs.

OLD DEARBORN DISTRIBUTING COMPANY, Appellant

Appeal from Circuit Count, Cook ——

JUDGMENT—June 17, 1936

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Decree aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error;

Therefore, it is considered by the Court that the Decree of the Circuit Court aforesaid, be Affirmed in all things and stand in full force and effect, notwithstanding the said [fols. 50-60] matter and things therein assigned for error.

And it is further considered by the Court that the said Appellee recover of and from the said Appellant its costs by it in this behalf expended and that he have execution therefor.

[fol. 61] IN SUPREME COURT OF ILLINOIS

[Title omitted]

ORDER ALLOWING APPEAL, ETC.—Filed July 7, 1936

The petition of Old Dearborn Distributing Company, a corporation, for an appeal in the above cause to the Supreme Court of the United States from the Supreme Court of the State of Illinois and the assignment of errors filed therewith and the record of said cause having been considered, it is:

Ordered that an appeal be and is allowed to the Supreme Court of the United States from the Supreme Court of the

State of Illinois as prayed in said petition, and that the Clerk of the Supreme Court of the State of Illinois so prepare and certify a transcript of the record and proceedings in the above cause and transmit the same to the Supreme Court of the United States within thirty (30) days from the date hereof.

It is Further Ordered that said Old Dearborn Distributing Company, a corporation, shall give good and sufficient security in the sum of two hundred fifty ($250.00) dollars, that said Appellant shall prosecute said appeal to effect, [fol. 62] and if said Appellant fail to make its plea good, it shall answer all damages and costs.

The said Appellant now presenting a bond in the sum of two hundred fifty ($250.00) dollars with Maryland Casualty Company of Baltimore, Maryland, as surety, it is:

Ordered that the same be, and is hereby approved.

Lott R. Herrick, Chief Justice of the Supreme Court of Illinois in the Last Resort in All Cases in Illinois.

Dated July 3, 1936.

[fols. 62½-75] [File endorsement omitted.]

[fol. 76] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed July 24, 1936

Comes now, Old Dearborn Distributing Company, a corporation, the Appellant in the above entitled cause, and states that the points upon which it intends to rely in this Court in this case are as follows:

1. The Illinois Fair Trade Act, Chapter 140, Sections 8 to 11 inclusive, page 3091, Illinois Revised Statutes 1935 deprives the appellant of its liberty without due process of law in violation of section 1 of the 14th Amendment to the Constitution of the United States of America.

2. The Illinois Fair Trade Act, Chapter 140, Sections 8 to 11 inclusive, page 3091, Illinois Revised Statutes 1935 deprives the appellant of its property without due process

of law in violation of section 1 of the 14th Amendment to the Constitution of the United States of America.

3. The Illinois Fair Trade Act, Chapter 140, Section 8 to 11 inclusive, page 3091, Illinois Revised Statutes 1935 deprives the appellant of the equal protection of the laws in violation of section 1 of the 14th Amendment to the Constitution of the United States of America.

4. The Illinois Fair Trade Act, Chapter 140, Sections 8 to 11 inclusive, page 3091, Illinois Revised Statutes 1935 is in violation of the first section of the 14th Amendment to the Constitution of the United States and therefore avoid for the following reasons:

(a) The said statute provides for price fixing by private individuals and the enforcement of said prices so fixed against parties not in contractual relationship with the person so fixing said prices as in said statute provided, and [redacted] not a proper exercise of the police power of the state or regulatory measure thereunder.

[fol. 77] (b) The right to buy, sell, barter, and exchange property and to fix the price at which one's own property shall be sold is an inherent right of the property itself and is subject to protection of section 1 of the 14th Amendment to the constitution of the United States.

(c) The "liberty" protected by section 1 of the 14th Amendment to the constitution of the United States embraces more than physical restraint and the freedom therefrom; and includes freedom to contract and pursue a lawful calling.

(d) The fundamental rights guaranteed by section 1 of the 14th amendment to the constitution of the United States are abridged and curtailed by said statute without justification, the said statute being a general restraint affecting all business of a private nature.

(e) The said statute imposes restrictions upon liberty and property in the absence of any purpose of protecting the public health, morals, safety or welfare; the said statute operates in an arbitrary, unreasonable and discriminatory manner and the said statute does not provide means which are appropriate to achieve the statutory purpose.

(f) The said statute fixing prices on ordinary commodities sold by ordinary businesses, is not within the scope of any constitutional power of the legislature of the state of Illinois.

(g) The said statute unconstitutionally vests in private persons arbitrary power to fix the prices at which another may sell his own property.

(h) The said statute grants to private persons unlimited power over the liberty and property of other persons and is too unrestrained and too susceptible of abuse.

(i) The said statute permits arbitrary, unreasonable and discriminatory price fixing.

(j) The said statute, if it is assumed, contrary to fact, that the prevention of use of "loss leaders" is the purpose of the statute, provides means adopted for the prevention of such practices wholly irrelevant to that purpose.

(k) The said statute, if it is assumed, contrary to fact, that the prevention of predatory price cutting (meaning thereby price cutting with deliberate intention to injure other persons) is the real object of the statute, then the statute in applying indiscriminately to all sales of all commodities at a price less than fixed by a manufacturer transcends the constitutional limits of legislative power.

(l) Said statute insofar as it purports to fix, determine, limit, restrict or regulate the prices at which the appellant may dispose of its property and without contractual relationship with the person so fixing said prices, deprives the appellant of its liberty and property by unreasonably and unduly interfering with the conduct of a lawful business, to-wit: the merchandising of alcoholic beverages.

(m) Said statute in the respect mentioned in the foregoing subdivision denies to the appellant the equal protection of the laws of the State of Illinois since it unduly and unreasonably interferes with the right of the appellant to acquire, possess and protect property as provided in Article 2, Sections 1 and 2 of the Constitution of the State of Illinois.

[fol. 78] Appellant further states that only the following parts of the record, as filed in this court, are deemed neces-

sary to be printed for the consideration of the points set forth above, viz.:

Title of Paper	Record Page
Complaint	2- 6
Answer	7-13
Reply	14-15
Decree	16-18
Opinion (Joseph Triner Corporation vs. McNeil Supreme Court of Ill. No. 23475)	24-42
Opinion in instant cause	43-48
Mandate	49-50

Dated July 10, 1936.

Irving Breakstone, Irving Greenspahn, Counsel for Appellant.

STATE OF ILLINOIS,
Cook County, ss:

William Rosenthal being first duly sworn on oath says that he is an attorney at law, and that on July 10, 1936 he did on Mayer Meyer Austrian & Platt, attorneys of record for the appellee, make due and timely service of the above statement of points to be relied upon and designations of the parts of the record material and necessary to the consideration of the case, this 10th day of July A. D. 1936, by leaving a true copy thereof with Mr. Richard Mayer, a member of said firm.

William Rosenthal.

Subscribed and sworn to before me this 10th day of July 1936. David Cohl, Notary Public Cook County Illinois. My Commission Expires August 18th 1938. (Seal.)

[fol. 78½] [File endorsement omitted.]

[fols. 79 & 80] SUPREME COURT OF THE UNITED STATES

APPELLEE'S DESIGNATION FOR PRINTING OF ADDITIONAL PARTS OF RECORD—Filed July 20, 1936

Comes now Seagram-Distillers Corporation, a corporation, Appellee in the above entitled cause, having been served with Appellant's Statement of Points to be Relied

upon and Designation of the Parts of the Record to be Printed, and does hereby designate, pursuant to paragraph 9 of Rule 13 of this Honorable Court, that the following additional parts of the record are necessary for and material to the consideration of the points involved in this cause and should therefore be printed:

The Abstract of Record filed with the Clerk of the Court, except the Decree and such portion of the pleadings contained in said Abstract which have already been designated to be printed by Appellant.

Dated July 19, 1936.

Richard Mayer, Counsel for Appellee.

[fol. 81] [File endorsement omitted.]

Endorsed on cover: File No. 40,766. Illinois Supreme Court. Term No. 226. Old Dearborn Distributing Company, appellant, vs. Seagram-Distillers Corporation. Filed July 24, 1936. Term No. 226, O. T., 1936.